

Table of contents.

Chapter1: Introduction	4
1. 1 Context	4
1.2 Scope and aims of the study	6
1.3 Assumptions and expected findings	9
1.4 Methodology	10
1.5 Research plan	11
Chapter 2: Legal issues behind the Establishment of the ICTR and the Application of IHL to the Rwandan conflict	13
2.1 Definition and Sources of IHL	13
2.1.1 The concept of IHL as compared to general public international law, international criminal law and human rights law	13
2.1.2 Sources of IHL	16
2.1.2.1 The four Geneva Conventions of 1949	16
2.1.2.2 The Protocols to the Geneva Conventions	16
2.1.2.2 Common Article 3 and Additional Protocol II	17
2.2 Armed Conflict and Serious Violations of IHL as prerequisites for its application	20
2.2.1 Armed Conflict	20
2.2.1.1 Definition of an armed conflict	20
2.2.1.2 Types of armed conflicts addressed by IHL	22
2.3 Serious violations of IHL	26
2.4 Nexus between violations and armed conflict	28
2.5 The 1990 – 1994 Rwanda armed conflict: an international legal perspective	32
2.5.1 Conflict in 1990 – 1994: origin, magnitude of the conflict and implications for IHL	32
2.5.2 Nature of the Rwanda armed conflict	35
2.5.3 International armed conflict or aggression	35
2.5.4 Non-international conflict	40
2.5.5 Assessment	44

Chapter 3: The jurisdiction of the ICTR	46
3.1 Foundational instruments	47
3.1.1 Security Council Resolution 955	47
3.1.2 Statute of the ICTR	48
3.2 Competence of the ICTR.....	49
3.2.1 Competence <i>ratione materiae</i>	50
3.2.1.1 Article 3 common to the Geneva Conventions, Additional Protocol II and Article 4 of ICTR Statute.....	52
3.2.1.2 The most frequent offences charged as serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II	54
3.2.2 Competence <i>ratione temporis</i>	61
3.2.3 Competence <i>ratione personae</i>	65
3.2.3.1 Personal competence with regard to the former Rwandan Government Side.	67
3.2.3.2 The personal competence for violations committed by the RPF	70
3.2.4 Competence <i>ratione loci</i> : Territory of Rwanda and neighbouring States.....	78
Chapter 4: ICTR jurisprudence and assessment	82
Sub – Chapter 1: Cases decided by the ICTR.....	82
4.1.1 The <i>Akayesu</i> case	82
4.1.1.1 Facts	82
4.1.1.2 Applicable law and decision.	83
4.1.2 The <i>Kayishema</i> and <i>Ruzindana</i> case.....	86
4.1.2.1 Facts	86
4.1.2.2 Applicable law and decision.	88
4.1.3. The <i>Rutaganda</i> case	90
4.1.3.1. Facts	90
4.1.3.2. Applicable law and decision.	91
4.1.4. The <i>Musema</i> case.....	94
4.1.4.1. Facts.....	94

4.1.4.2. Applicable law and decision.....	95
4.1.5. The <i>Semanza</i> case	97
4.1.5.1. Facts	97
4.1.5.2. Applicable law and decision	98
4.1.5.3. The dissenting opinion of Judge <i>Ostrovsky</i>	101
4.1.6. The <i>Kamuhanda</i> case.....	102
4.1.6.1. The facts.....	102
4.1.6.2. Applicable law and decision	103
4.1.7 The <i>Imanishimwe</i> case	105
4.1.7.1 Facts	105
4.1.7.2. Applicable law and decision.	108
Sub-chapter 2: The doctrine of judicial notice.....	111
Sub-chapter 3: Assessment of the ICTR jurisprudence.....	115
4.3.1 The nature of the conflict in Rwanda.....	116
4.3.2 The doctrine of judicial notice was not fully applied to determine the nature of the conflict in Rwanda.	126
4.3.3 Assessment of the <i>nexus</i>	128
Chapter 5: Conclusion.....	131
Bibliography.....	140

Chapter1: Introduction

1. 1. Context

On August 4, 1993, following years of negotiations, the then Government of Rwanda and the Rwandan Patriotic Front (RPF) signed the Arusha Peace Agreement. The Agreement described a broad role for the United Nations (UN), through what the agreement termed the Neutral International Force (NIF), in monitoring the implementation of the Accord during a transitional 22 months' period. Previously, in a letter to the Secretary-General on June 14, 1993 (S/25951), the government and the RPF jointly requested the establishment of such a force and asked the Secretary-General to send a reconnaissance team to Rwanda to plan the deployment of such force. The parties agreed that the existing OAU Neutral Monitoring Group (NMOG II) could be integrated into the NIF¹.

The UN established a military force code-named UNAMIR (United Nations Assistance Mission for Rwanda) by Security Council Resolution 872(1993) of October 5, 1993 with a mandate that included the following:

- a) to contribute to the security of the city of Kigali, *inter alia*, within a weapons-secure area established by the parties in and around the city;
- b) to monitor observance of the ceasefire agreement, which calls for the establishment of cantonment and assembly zones and the demarcation of the new demilitarised zone and other demilitarisation procedures;
- c) to monitor the security situation during the final period of the transitional government's mandate, leading up to the elections;
- d) to assist with mine clearance, primarily through training programs;
- e) to investigate at the request of the parties, or on its own initiative, instances of alleged non-compliance with the provisions of the Protocol of Agreement on the Integration of the Armed Forces of the Two Parties, and to pursue any such instances with the parties responsible and report thereon as appropriate to the Secretary-General;
- f) to monitor the process of repatriation of Rwandan refugees and resettlement of displaced persons to verify that it is carried out in a safe and orderly manner;

¹ Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, December 15, 1999, also available at http://www.un.org/News/oss/rwanda_report.htm, Accessed May 16, 2000.

- g) to assist in the coordination of humanitarian assistance activities in conjunction with relief operations; and
- h) to investigate and report on incidents regarding the activities of the gendarmerie and police.²

In 1994 however, and despite the signing of the peace agreement and the presence of the UN peace keeping mission, hundreds of thousands of civilians were massacred in Rwanda following a four year war between the RAF and the RPF. This war resulted in large scale massacres of civilian population, especially after the death of Major General Juvenal Habyarimana, the then President of Rwanda, on April 6, 1994 in a mysterious plane crash.

The RPF ultimately won the war and the RAF followed by millions of civilians fled to neighbouring states. On November 8, 1994, the Security Council (SC) acting under Chapter VII of the UN Charter passed a resolution³ establishing an International Criminal Court to try persons allegedly responsible for genocide, crimes against humanity and serious violations of Common Article 3 to the four Geneva Conventions of 1949⁴ and Additional Protocol II of 1977.⁵ The ICTR is a product of a Commission of Experts and the new RPF government of Rwanda. An author referred to the ICTR as a Genocide Tribunal.⁶ The major incentive for establishing the Rwanda Tribunal was, in the view of O'Brien, "the disgraceful lack of activity on the part of the international community during the genocide".⁷ The International

² SC Res. 872(1993) of October 5, 1993.

³ SC Res. 955 (1994) of November 8, 1994.

⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, United Nations Treaty Series, vol. 75, No.970 ("Geneva Convention I"); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, August 12, 1949, *ibid* No.971 ("Geneva Convention II"); *Geneva Convention relative to the Treatment of Prisoners of War*, August 12, 1949, *ibid*, No.972 ("Geneva Convention III"); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, *ibid* No.973 ("Geneva Convention IV").

⁵ *Protocol Additional relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, United Nations Treaty Series, vol. 1125, No. 17513.

⁶ Van den Herik, L. J., *The contribution of the Rwanda Tribunal to the Development of International Law*, Amsterdam, 2005, p 31.

⁷ *Ibidem*, p 32.

Criminal Tribunal for Rwanda (ICTR) was established in Arusha, Tanzania⁸ and began its work in early 1996.

1.2. Scope and aims of the study

This research focuses on the jurisprudence of the ICTR under article 4⁹ of its Statute¹⁰ and does not address other aspects. Such aspects are, for instance, the jurisdiction of the Tribunal under genocide and crimes against humanity as well as its organisation and functioning. Although they are of utmost importance, they will not be dealt with in this work. To arrive at the main and only goal however, it is quite instructive to lay some theoretical foundations about the part of IHL the study treats and how it is applied to the conflict that took place in Rwanda from 1990 to 1994.

⁸ The seat of the ICTR was established in Tanzania according to the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda, August 31, 1995; see also Letter dated August 31, 1995 from the United Nations Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the Permanent Representative of the United Republic of Tanzania to the United Nations; Letter dated 31 August 1995 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the United Nations Under-Secretary-General for Legal Affairs, the Legal Counsel. Both the interpretation and implementation of the provisions of articles VII, XV, XX, XXV and XXVIII of the Agreement.

⁹ Article 4 of the ICTR Statute reads as follow:

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
- h) Threats to commit any of the foregoing acts.

¹⁰ The Statute of the International Criminal Tribunal for Rwanda is annexed to Resolution 955 of November 8, 1994, adopted by the Security Council at its 3453rd meeting on November 8, 1994 referred to as Resolution 955 (1994), S/RES/955/1994, November 8, 1994.

From a legal point of view, a proper characterisation of the armed conflict, based on available facts, (whether established by the ICTR or are opinions of various experts and academics) would determine which aspects of IHL apply.¹¹ IHL applies different rules depending on whether an armed conflict is international or internal in nature.¹² The analysis is therefore not bound only by the facts established by the Tribunal; it goes beyond that.

The goal here is to find whether the conflict that took place in Rwanda from October 1990 through July 1994 (even the portion that constitutes the temporal competence of the ICTR), fits in the requirements for a proper application of Article 3 Common to the Geneva Conventions and Additional Protocol II. This is another way of approaching the problem because what the Chambers of the ICTR did was to see whether the provisions of these legal instruments were applicable to the situation in Rwanda.

In assessing the nature of the conflict in the *Akayesu*¹³ case, the Trial Chamber held that:

(...) Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council (...)¹⁴

This is hardly convincing in all aspects.

¹¹ Humanitarian Law Violations in Kosovo, Human Rights Watch Report 1998, available at <http://www.hrw.org/reports98/kosovo/Kos9810-11.htm>, accessed on 14 January 2005.

¹² Stewart J G., "Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict", in *Revue Internationale de la Croix Rouge/ International Revue of the Red Cross*, Vol. 85 No 850, June 2003, pp 313 – 350 at p 313.

¹³ *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR - 96 - 4 - T, October 02, 1998, referred to as *Akayesu*, (TC).

¹⁴ *Akayesu*, (TC), para 606.

As far as the nature of the conflict is concerned, the *Akayesu* judgment has become jurisprudence of the ICTR particularly on a fact-finding level, and the prosecutor has, on various occasions, attempted to move the chambers to take judicial notice¹⁵ of the nature of the conflict in Rwanda, obviously to avoid any further inquiry into the true nature of the conflict. Both the Appeals and Trial Chambers did not clearly determine the true nature of the conflict thus leaving great room for speculation and relying solely on the determination made by the UN SC.

In addition, focus is also on the requirements *per se* to trigger findings of guilty or innocence of an accused under serious violations of IHL. It is necessary to assess the situation in Rwanda in an attempt to characterise the nature of the conflict. It is an opinion that the war in Rwanda had many ingredients and if they were carefully analysed, they would bear more on the internationality of the conflict rather than on its internal character, as it was found by the Trial Chambers of the ICTR.

The research is not intended to simply and solely attack the opinions expressed by the ICTR judges in arriving at their conclusions regarding the nature of the conflict in Rwanda. The question is rather to know whether the judges, beside reliance on the conclusions of the Commission of Experts and taking judicial notices, indulged in more debates on this matter. It is a legitimate approach and that is what research in general is all about. A researcher can not be blamed for formulating a different opinion to the so-called common knowledge about the nature of the conflict in Rwanda if he/she can succeed, based on the existing theory and available facts, in proving that the path chosen by the ICTR was not the right one. This approach does in no way deny the jurisdiction of the ICTR. Should the ICTR have applied the correct criteria; it should have arrived at a different classification of the conflict. The ICTY (which was established following the same pattern, namely reports of commissions of expert and other official UN documents) went further and characterised the conflicts in the former Yugoslavia which the ICTR declined to do.

¹⁵ Article 94 of the Rules of Procedure and Evidence empowers the Trial Chamber to take judicial notice of matters of common knowledge without requiring proof of facts thereof.

This work relies not only on the facts as established by the ICTR and the tenets of IHL applicable in this domain. It also refers to other branches of Public International Law such as State responsibility and the notion of aggression as well as relevant international and regional instruments which can be put forward to argue this thesis. The opinions expressed are supported by the facts brought in evidence before the various Chambers even though they were not considered by the judges.

The overall interest in this undertaking was gained as a result of a position of Legal Assistant in two cases decided by or pending before the ICTR that benefited the author of this dissertation.¹⁶ This study will rather deal with the approach of the Tribunal to the application of Article 3 common to the Geneva Conventions and Additional Protocol II. More specifically, this research intends to deepen the analysis of the key requirements for the applicability of these provisions.

1.3. Assumptions and expected findings

The establishment of the ICTR although controversial and open to criticism,¹⁷ was an adequate international response to the Rwandan conflict and serious violations of IHL. In its inception, however, an analyst¹⁸ sighted potential shortcomings due to its limited mandate, limited in time, limited in who can be indicted, and narrow limitation in jurisdiction regarding violations of IHL that may prevent any light from being shed on the real issue

¹⁶ Mr. Etienne MUTABAZI is currently a Defense Legal Assistant and Investigator in the case of Lieutenant Samuel Imanishimwe and that of Major General Augustin Bizimungu. Those cases are referred to as *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No ICTR – 99 – 46 - T; *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François Xavier Nzuwonemeye and Innocent Sagahutu*, Case No ICTR – 2000 – 56 – T.

¹⁷ Philpot J., “*The International Criminal Tribunal for Rwanda: Justice Betrayed*”, American Association of Jurists, Montréal, Québec, October 1995. The author argues that in its form and structure, the Tribunal does not respect basic legal requirements of independence, impartiality, and broad international acceptance required of a tribunal set up in international law. He further maintains that the likely result of its hearings and judgments will be the reinforcement of a distorted one-sided view of the crisis in Rwanda, and a justification for further genocide against the Hutu populations of the region by the Tutsi minority now in power. It will legitimate further interventionist policies in Africa and elsewhere to the detriment of established principles of international law and institutionalize the de facto impunity for the members and supporters of the present government of Rwanda who undoubtedly committed many serious crimes between October 1, 1990 and the present. It will likely prevent the international community from learning about the causes of the terrible events, which took place in Rwanda from 1990 to the present.

¹⁸ Ibidem, p. 2.

raised by the Rwandan conflict, namely that of an armed military intervention in Rwanda from Uganda, the root cause of the conflict.

The existence of an armed conflict in Rwanda was a precondition to the applicability of IHL, particularly the application of Additional Protocol II that requires an internal armed conflict. However, after the Security Council and the ICTR failed to properly characterise the conflict, by confining it as a non-international armed conflict while it was, to a large extent, international, all the expectations vanished. Such characterisation of the conflict impacted negatively on the quality of the jurisprudence of the ICTR (for instance Ugandans and RPF officers have not been prosecuted yet, the *nexus* between the acts allegedly posed and the armed conflict is not fully established). This leads to a questionable jurisprudence on some legal issues. The approach of the ICTR to the applicability of article 3 Common to the Geneva Conventions and Additional Protocol II has not been consistent and convincing.

Despite these shortcomings, like its sister, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICTR has done tremendous work and contributed to the development of IHL and Criminal Law.

1.4. Methodology

The working method chosen consists of a theoretical and descriptive part where the attempt is to elaborate on the current understanding of the scope of that part of IHL applicable in situations of non-international armed conflicts. It is based on some diverse writings in this domain. The study particularly benefited from authoritative works done in the area of armed conflicts in general and the law that applies to internal strives. Furthermore, it is of great assistance to have definitions of key terms which constitute the main requirements for the application of article 4 of the ICTR Statute and the paragraphs of that article which preoccupied the Tribunal. The work relies on various information, such as evidence heard by the Trial Chambers and other relevant information like court records, pre trial decisions, decisions on motions by the parties and so forth. The ICTY cases were also used as important references where the author believed that they could be of some guidance to similar situations adjudicated by the ICTY. The writer deems these materials useful to sustain his thesis. This part is followed by an ICTR case study. Some cases were so important or

otherwise elaborated on the conditions and requirements for the applicability of Common Article 3 and Additional Protocol II, that they attracted the attention of the author.

1.5. Research plan

This work is divided into six chapters. The introductory chapter fixes the context, the aims, goals and the expectations in undertaking a work of this magnitude.

Chapter two addresses the legal framework that led to the establishment of the ICTR. It first of all makes a distinction among the concepts of IHL, general public international law, international criminal law and human rights law. The IHL covers all instances of armed conflict to protect all the victims who may be affected by the hostilities. Because the scope of the work is article 3 Common to the Geneva Conventions and Additional Protocol II, the emphasis is largely put on these provisions and more details are provided regarding their conditions of applicability. The armed conflict is generally defined and particularly presented in its internal character. The chapter looks also at the Rwandan conflict situation, its origin and implications for IHL as well as to the facts that should have been relied upon for a better determination of its nature. Those facts are, for instance, the evidence heard by the Trial Chambers, the jurisprudence of the ICTY and the Military Tribunal at *Nuremberg*. Finally an assessment is made at the end of the chapter recalling other aspects of public international law that could have been considered as well.

Chapter three analyses the jurisdiction of the ICTR. It starts with the foundational instruments, namely SC Resolution 955 of November 8, 1994 and the Statute of the Tribunal annexed thereto. The Statute provides for a temporal jurisdiction covering the year 1994. The persons who may be prosecuted are those Rwandan citizens suspected of crimes falling in the material competence of the Tribunal, namely genocide, crimes against humanity and serious violations of Common Article 3 and Additional Protocol II. The research concentrates basically and solely on the competence under article 4 of the Statute. The territorial competence is the Republic of Rwanda and neighbouring states. The armed conflict that gave rise to the establishment of an international tribunal for Rwanda involved two parties, the RPF and different structures of the then government of Rwanda. The current prosecution is

selectively directed against the former government and its structures. No one from the RPF side has been indicted yet notwithstanding the provisions of the Statute, abundant evidence incriminating the RPF, and so forth.

Chapter four is a case study and assessment of important decisions of the ICTR. It analyses the cases that elaborate practically on the application of article 4 of the ICTR Statute. Those cases are: *Akayesu*, *Kayishema* and *Ruzindana*, *Rutaganda*, *Musema*, *Semanza*, *Cyangugu* and *Kamuhanda*. The issue here is the facts of each case, the applicable law and the subsequent Chambers' decision on trial level as well as on appeal, where available. A final assessment is made on important requirements, namely the nature of the conflict and the *nexus*. It is an opinion once again that the ICTR did not define the conflict. It rather arrived at its factual and legal findings through other criteria like the doctrine of judicial notices. The work studied this doctrine and concludes that it was not fully applied.

A concluding chapter recalls important developments raised throughout the entire work. It continues and summarizes the requirements under article 4 of the Statute as they were used in dealing with crucial cases.

Chapter 2: Legal issues behind the establishment of the ICTR and the application of IHL to the Rwandan conflict

2.1 Definition and sources of IHL

2.1.1 The concept of IHL as compared to general public international law, international criminal law and human rights law

International humanitarian law (IHL) is a very important part of international law relating to times of armed conflict. The rules that it establishes apply only in situations of armed conflicts.¹⁹ In one sense it would mean the law of war setting out rules that all combatants must follow.²⁰ In another sense, much broader however, IHL is better explained by its goal: to protect people who are not or no longer taking part in hostilities as well as to restrict the methods and means used to wage war. Its purpose is to limit the suffering that war causes by affording victims the maximum possible protection and assistance. IHL is therefore concerned with the reality of armed conflict around the world; it does not address issues such as the grounds or possible justification under international law for going to war or engaging in armed conflict.²¹

In the case of non-international armed conflict, what is most striking is not so much the fact that international law regulates such a situation but the fact that those international rules apply not only to the use of force by the government but also directly to all violent human behaviour in such situations. Thus international law governs human behaviour whenever violence is used, when essential features of the organised structure of the international and

¹⁹ Abi-Saab R., "Humanitarian Law and International Conflicts: the evolution of legal concern", in *Humanitarian Law of Armed Conflict: Challenges Ahead, essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp 209 – 223, at p 222.

²⁰ Available at <http://www.ihl-qna.htm>, accessed on 15 January 2005.

²¹ Available at http://www.hum_vr_html.htm, accessed on 15 January 2005.

national community have fallen apart. No national legal system contains similar rules on how those who violate its primary rules have to behave while violating them.²²

On one hand, IHL and international human rights (IHRL) complement one another. While both aim to protect individuals, they do so in different circumstances and in different ways. IHL is concerned with situations of armed conflict. However, the main focus of IHRL is to ensure that the rights of individuals in peacetime are not violated by organs of the state. Even in times of armed conflict; however, there are some human rights which must under all circumstances be respected, while others may be suspended by the state. It should also be noted that IHRL does not consist of norms designed to limit the means and methods of warfare, which is one of the prime objectives of IHL.

On the other hand, while article 2(7) of the UN Charter provides that the UN cannot intervene within domestic jurisdiction of any state or under the Charter, both state practice and international obligations entered into by the state suggest at least two exceptions to that rule.²³ Alternatively, if they are not exceptions one can say that certain matters occurring within the land territory of one state may not necessarily be within the exclusive jurisdiction of that state and outside of the international domain. Those two areas are international human rights law and humanitarian law.²⁴ So both humanitarian law and human rights are designed to restrict the power of state authorities, with a view to safeguarding the fundamental rights of the individual. This is not designed to suggest any intervention in the domestic affairs of a state, it rather emphasises particularly the pure humanitarian aim of IHL and the non-derogation of some rights. The ICRC commentary of article 3 of Additional Protocol II provides that this position does not affect the right of states to take appropriate measures for maintaining, restoring law and order or defending their national unity and territorial

²² Sassòli M and Bouvier A A, *How does Law Protect in War: Cases, Documents, and teachings materials on contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, Geneva, 1999, p 74.

²³ Hampson F, "Human Rights and Humanitarian Law in Internal Conflicts", in Meyer M A., *Armed Conflicts and the New law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, pp.55 - 80, at p.55.

²⁴ Ibidem, page 55; see also Schermers H G., "The Obligation to intervene in Domestic Affairs of States", in *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, pp 583 - 593.

integrity.²⁵ The principle of inviolability of the national sovereignty and that of non-intervention in domestic affairs coexist with the application of IHL in situations of armed conflict.

Moreover, in internal armed conflicts, human rights law and international humanitarian law apply concurrently. In other words, humanitarian law is a specialised body of human rights law, fine tuned for times of armed conflict. Some of its provisions have no equivalent in human rights law, in particular the rules on the conduct of hostilities or on the use of weapons. Conversely, human rights law covers several domains which are outside the scope of humanitarian law (e.g. the political rights of individual persons). Despite their overlapping, human rights law and humanitarian law remain distinct branches of public international law.²⁶

In a criminal law perspective and particularly in the context of international prosecutions, the ICTY held that:

the role of the State is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the State and, conversely, its participation in the commission of the offence is no defense to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the State involved, and its agents.²⁷

As compared to international criminal law (ICL), IHRL establishes lists of protected rights whereas ICL lists offences.²⁸

²⁵ International Committee of the Red Cross, *Commentary of the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987, p 1362.

²⁶ Gasser H P, "International humanitarian law and the protection of war victims", available at <http://www.humanitarianlaw.htm>, accessed on 18 January 2005.

²⁷ *Kumarac*, (TC), par 470.

²⁸ *Id.*

2.1.2 Sources of IHL

The main sources of IHL obligations are the four Geneva Conventions of 1949, their two protocols of 1977, and customary international law. The latter consists of principles that, because of their wide acceptance by nations, are considered binding on all belligerents. The key building blocks that lead to the Geneva Conventions are the Hague Conventions of 1899 and 1907. While the main focus of The Hague Conventions was to regulate the conduct of hostilities and lawful means of combat²⁹, the Geneva Conventions lay down rules for the protection of the wounded, prisoners of war and civilians. A brief analysis will be made of the four Geneva Conventions and their Additional Protocols.

2.1.2.1 The four Geneva Conventions of 1949

The provisions of the four Geneva Conventions but one, common to all, address issues of IHL resulting from international armed conflict. These conventions, in general, govern the conduct of hostilities for the duration of the ‘armed conflict’.³⁰ Article 3 common to all four Conventions deals with a minimum threshold of humanitarian protection for all persons affected by a non-international conflict. This protection was enhanced in the 1977 Additional Protocol II.³¹

2.1.2.2 The Protocols to the Geneva Conventions

Developments after the adoption of the 1949 Geneva Conventions led to the growing realisation that the law of armed conflict needed further adaptation.³² Three major factors explain the rethinking of new rules governing armed conflicts. The ever-increasing advancement of technology brought about weapons capable of causing massive suffering and destruction³³ aimed not only at combatants alone but also at innocent civilians. The era of

²⁹ Sassòli M and Bouvier A A., op cit p 1357.

³⁰ Jinks D, “The Temporary Scope of application of International Humanitarian Law in Contemporary Conflicts”, in Harvard Program on Humanitarian Policy and Conflict Research, *International Humanitarian Law Research Initiative*, January 2003, also available at <http://www.hsph.harvard.edu/hpcr>, accessed on 18 January 2005.

³¹ *Akayesu*, (TC), par 601.

³² Kwakwa E K, *The International Law of Armed conflict: personal field of application*, Kluwer Academic Publishers, Dordrecht/Boston/London, 1992, p 19.

³³ *Ibidem*, p 19.

decolonisation was accompanied by the proliferation of struggles against colonial and alien domination which, in many instances, justified the resort to armed movements. Another changed circumstance had been the increasing number of internal conflicts.³⁴ In response to these new challenges, two additional protocols were adopted in 1977. Protocol I applies to international armed conflicts. It develops the rules contained in the Conventions of 1949. Arguably, it is an adaptation of IHL to the realities of guerrilla warfare.³⁵ It also protects the civilian population against the effects of hostilities in international conflicts. Further, this protocol sets up the rules for the conduct of hostilities.

Protocol II applies in the case of non-international armed conflicts. It extends the fundamental guarantees protecting all those who do not or are no longer actively participating in hostilities. It also protects the civilian population against the effects of those hostilities.

2.1.2.2 Common article 3 and Additional Protocol II

The two principal instruments that apply in the context of internal armed conflicts are common article 3 to the Geneva Conventions of 1949 and Additional Protocol II of 1977. Common article 3 to the Geneva Conventions of 1949 contains certain minimum guarantees for the treatment of the civilian population. It is applicable to all parties in an internal armed conflict. Additional Protocol II of 1977 further develops and details the minimum guarantees in common article 3 to the Geneva Conventions.³⁶ Because these two provisions are at stake in this work, a detailed explanation needs to be provided for a critical perspective.

2.1.2.3.1 Common Article 3

The introductory part of Common Article 3 provides that the article applies “in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions”. Some major elements within are immediately discernable, namely an

³⁴ Kwakwa E K, op cit, p 20.

³⁵ Sassòli M and. Bouvier A. A., op cit, p 103.

³⁶ Available at [http://www. Easy References to IHL and HR.htm](http://www.EasyReferences.to/IHL%20and%20HR.htm), accessed on 18 January 2005.

armed conflict, not of an international character, the territory of a High Contracting Party and the minimum humanitarian provisions that conflicting parties are bound to apply. There have always been diverse viewpoints on the meaning of these terms. Since the Diplomatic Conference of 1949³⁷, there has been an unwillingness to give out a clear and easily understandable definition thereof³⁸ as well as the relationship between Common Article 3 and Additional Protocol II³⁹.

There is no doubt whatsoever that Common Article 3 is basically intended to protect great values vested in a human person against any serious abuses committed by other human persons. A close look at the four Geneva Conventions clearly demonstrates that the criminal liability of violators in non-international armed conflicts and the subsequent rights of defendants were not considered in the whole existence of the conventions and its Additional Protocol II⁴⁰. It is quite surprising that the Conventions, in the context of international armed

³⁷ The Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, convened by the Swiss Federal Council, was held in Geneva from 21 April to 12 August 1949.

³⁸ See for example M. Gandhi, where he remarks that:

Common article 3 appears to have been constructed ambiguously with a view to achieve a delicate compromise acceptable to States, which are in favour of the restrictive application of humanitarian law to non-international armed conflict. However recent efforts to expand the scope of common article 3 by national legislation and through judicial interpretation by national courts offer much more protection to the victims of non-international armed conflicts than its implementation through international ad-hoc tribunals.

Gandhi M., "Common Article 3 of Geneva Conventions 1949 in The Era Of International Criminal Tribunals", in *ISIL Year Book of International Humanitarian and Refugee Law*, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>, accessed on November 17, 2004.

³⁹ "Thus, the questions are asked what will be the relationship between this Protocol and Article 3 Common to the Conventions; what will be the boundary line separating international armed conflicts from non-international ones; and what will constitute the lower boundary where non-international armed conflicts are distinguished from situations of political tensions, riots and the like? These questions, no matter how interesting, are not going to be discussed here", Kalshoven F, "Applicability of customary international law in non-international armed conflict" in Cassese A., *Current Problems of International Law, essays on U.N. Law and on the Law of Armed conflict*, Milano – Dott. A. Giuffrè Editore, 1975, pp. 267 – 285, at p 267.

⁴⁰ Consider as illustration an extract from the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*:

Other delegations expressed the view that violations committed in internal armed conflicts should not be included, that the inclusion of such violations was unrealistic and could undermine the universal or widespread acceptance of the Court, that individual criminal responsibility for such violations was not clearly established as a matter of existing law, with attention being drawn to the absence of criminal offence or enforcement provisions in Additional Protocol II, and that customary law had not changed in this respect since the Rwanda Tribunal Statute. Different views were also expressed concerning the direct applicability of the law of armed conflict to individuals in contrast to States.

conflicts, provide details for the prosecution of alleged violators of their contents as well as the rights of defendants⁴¹. No such provisions exist with regard to alleged violators in the context of non-international armed conflicts⁴². This certainly constitutes a lacuna⁴³.

Criminal provisions contained in the four Conventions address the “grave breaches” of the conventions, but nothing is said regarding the “serious violations” encountered in non-international armed conflict. It is in fact a new dimension in addition to the main purpose of protecting humanitarian values. Defining the framework in which defendants can find their rights does not deprive the provision of its main purpose, it rather promotes the full and complete implementation because everyone knows to what he/she is exposing himself/herself in undertaking to violate this piece of humanitarian law.

2.1.2.3.2 Additional Protocol II⁴⁴

Protocol II applies in case of conflicts of a non-international character. It contains more elaborate rules on non-international conflicts. It fills the loopholes embodied in Common Article 3 in view of the great number of internal conflicts and the magnitude of their humanitarian problems.⁴⁵ The threshold of applicability of Protocol II can be found in Article 1 under the title "Material field of application". The protocol is a supplement to Common Article 3, and "shall apply to all armed conflicts which are not covered by Article 1 of Protocol I, and which take place in the territory of a High Contracting Party between its

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996), at par 76.

⁴¹ See articles 49 to 52 of Convention I; articles 50 to 53 of Convention II; articles 129 to 132 of Convention III; articles 146 to 149 of Convention IV and article 85 to 91 of Additional Protocol I.

⁴² Moir L, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002, p 232.

⁴³ Bothe M, “War Crimes in Non-International Armed Conflicts”, in Dinstein Y. and Tabory M., *War Crimes in International Law*, Buchmann Faculty of Law, Tel Aviv, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996, pages 293 – 304, at p 294.

⁴⁴ Additional Protocol II covers the following:

- (a) Fundamental guarantees for human treatment (similar to Common Article 3 but more detailed);
- (b) special protection for children in the fields of education, recruitment, reunification, and safe areas;
- (c) minimum standards for people deprived of their liberty;
- (d) protection of the civilian population and civilian subjects;
- (e) relief action subject to the consent of the State (similar to Common Article 3).

⁴⁵ Schindler D and Toman J, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents, Part I*, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1988, p IX.

armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Furthermore, subparagraph 2 of the same article goes on to state: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

One of the major problems then, is to successfully argue that, in a given situation, Protocol II is applicable. The type of internal conflicts that are currently taking place all over the world are triggered by small factions and movements, which may be seen as not being "dissident armed forces", or "organised armed groups".

2.2 Armed Conflict and Serious Violations of IHL as prerequisites for its application

2.2.1 Armed Conflict

2.2.1.1 Definition of an armed conflict

The Geneva Conventions do not clearly define the term "armed conflict". This omission was apparently deliberate since it was hoped that this term would continue to be purely factual and not become laden with legal technicalities⁴⁶. This idea is however losing ground pursuant to research and jurisdictional decisions.

Article 2 common to the Geneva Convention refers to "armed conflict" as any dispute arising between two States and leading to the intervention of members of the armed forces, even if one of the parties denies the existence of a state of war. The use of the word "war" was deliberately abandoned possibly to avoid endless arguments about its meaning. Consider the example of a state which uses arms to commit a hostile act against another state and always maintain that it is not making war, but merely engaging in a police action, or acting in

⁴⁶ Fleck D, *The Handbook of Humanitarian Law in armed Conflicts*, Oxford University Press, 1995, p 42.

legitimate self-defence.⁴⁷ It is, in the spirit of article 2, irrelevant that each or both states engaged in the war, agree to the existence of a state of war as the Convention has been drawn up first and foremost to protect individuals, and not to serve the interest of States.⁴⁸ The motivation for states to deny that war exists between them runs the gamut from the desire to maintain normal diplomatic, commercial and legal relations without interruption, to concerns about the psychological impact on the public if a war is acknowledged to exist in the legal sense.⁴⁹

Over time, this broad and indeterminate view came to evolve to where an armed conflict was defined by looking at the intensity of the hostilities. It is only when fighting reaches a level of intensity exceeding that of isolated clashes that it is treated as an armed conflict⁵⁰ to which the rules of IHL apply.

The ICTY defined an armed conflict in the *Tadic Case*. The Appeals Chamber held that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁵¹

This definition is better than nothing although it doesn't add anything to the position in article 2 common to the Geneva Conventions. The ICTR, however, suggested some criteria to be relied upon, which it termed "evaluation test". In the *Akayesu Case*, the ICTR held as follows:

The term armed conflict in itself suggests the existence of hostilities between armed forces organised to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions.⁵²

⁴⁷ De Preux J, *The Geneva Conventions of 12 August 1949: Commentary; III Geneva Convention Relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, p 23.

⁴⁸ *Ibidem*, p 23.

⁴⁹ Cohan J. A., "Legal War: When Does It Exist, and When Does It end?", in *Hastings International and Comparative Law Review*, Volume 27, Number 2, Winter 2004, pp 221 - 318, at p 224.

⁵⁰ Fleck D, *op cit*, p 42.

⁵¹ *Tadic* (Jurisdiction), para 70.

⁵² *Akayesu*, (TC), para 620.

The term “armed conflict” as actually defined refers to a state of prolonged and concerted hostilities that call for the application of IHL. Addressing the situation in Yugoslavia, Human Rights Watch concluded by suggesting that, in terms of international law, the confrontation between the Yugoslav government and an armed insurgency was an armed conflict because there had been ongoing and concerted attacks against the Serbian police and Yugoslav Army.⁵³

2.2.1.2 Types of armed conflicts addressed by IHL

International law recognises at least four types of conflict situations, each of which is governed by a different set of legal norms: (i) situations of tensions and disturbances; (ii) international armed conflicts; (iii) wars of national liberation; and (iv) internal armed conflicts.⁵⁴ This categorisation emanates from the Geneva Conventions as regard international and internal conflicts. Protocol I introduced the armed conflict qualifying as a national liberation movement.⁵⁵ Paragraph 2 of article 1 of Additional Protocol II excludes situations of internal disturbances and tensions from the Protocol’s field of application determining its lower threshold.⁵⁶ The distinction between international and internal armed conflicts was further adjudicated in judicial decisions.⁵⁷

The ICTR was of the view that in the field of IHL, a clear distinction as to the thresholds of application has been made among situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable.⁵⁸ For the purpose of this work, only armed conflict of a non-international character will be considered.

⁵³ Human Rights Watch, “Humanitarian Law Violations in Kosovo”, available at <http://hrw.org/reports98/kosovo/Kos9810-11.htm> , accessed on 14 January 2005.

⁵⁴ Freeman M, “International Law and Internal Armed Conflicts: Clarifying the Interplay between Human Rights and Humanitarian Protections”, in *The Journal of Humanitarian Assistance*, available at <http://www.jha.ac/articles/a059.htm>, posted on 17 October 2000; Higgins N, *The Application of International Law to Wars of National Liberation*, (non edited), p 2; *Tadic*, (AC), para 31 – 44.

⁵⁵ Art.1 (4), of Additional Protocol I.

⁵⁶ ICRC, Commentary, p 1349.

⁵⁷ *Tadic*, (Jurisdiction), para 76 – 77;

⁵⁸ *Akayesu*, (TC) para 601.

The objective of the demonstration is not to classify this kind of armed conflict by looking at its intensity, but rather to also look at its starting point.

2.2.1.2.1 Armed conflicts of an international character

In the normal course of events, the term “international armed conflict” refers to a conflict between two or more states. The international law of armed conflict developed in relation to inter-state conflicts and was not in any way concerned with conflicts occurring within the territory of any state or with a conflict between an imperial power and a colonial territory.⁵⁹ Article 1, paragraph 4 of Additional Protocol I, however, provides that the term includes:...armed conflicts in which peoples fight against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁶⁰ However, a conflict between a national liberation movement and an established government is a unique form of conflict, involving both guerrilla and regular armed warfare and engendering much bitterness, injury and death. Conflict of this type also creates many difficult legal questions. These intrastate struggles are difficult to define and have grave consequences for both the members of the national liberation movement and the armed forces of the government in question.⁶¹ So to say, a national liberation conflict may take multiple forms depending on the established regime the conflict is directed against. Higgins notes that identifying a war of national liberation can, in some instances, be quite difficult. This is mainly because States generally refuse to recognise a conflict as being a war of national liberation as this would mean that its governing policy was oppressive, racist, or denying rights such as self-determination to its people.⁶²

2.2.1.2.2 Non-international armed conflicts

An internal armed conflict is more difficult to define, since it is sometimes debatable whether hostilities within a state have reached the level of an armed conflict, in contrast to tensions,

⁵⁹ Green L. C., *The Contemporary Law of Armed Conflict*, Manchester University Press, 1993, p 52.

⁶⁰ Fleck D, *op cit*, p 42.

⁶¹ Higgins N, *op. cit.*, p 2

⁶² *Ibidem*, p 2.

disturbances, riots, or isolated acts of violence.⁶³ The official commentary to the Geneva Conventions goes even further to qualify the expression as so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry.⁶⁴ The commentary lists a series of conditions that, although not obligatory, provide some convenient guidelines. Those conditions are the following:

- (1) That the Party in revolt against the *de jure* Government possesses an organised military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the convention;
- (2) That the legal government is obliged to have recourse to the regular military forces against insurgents organised as military and in possession of a part of the national territory;
- (3) (a) That the *de jure* Government has recognised the insurgents as belligerents; or
(b) That it has claimed for itself the rights of a belligerent; or
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression;
- (4) (a) That the insurgents have an organisation purporting to have the characteristics of a State;
(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory;
(c) That the armed forces act under the direction of the organised civil authority and are to observe the ordinary laws of war;
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention⁶⁵.

The ICTR attempted to define “internal conflict” in Rwanda by confining its analysis to the intensity of the hostilities and the organisation of the parties involved.⁶⁶ This test can only

⁶³ Human Rights Watch, *supra* note 53.

⁶⁴ De Preux J., *op. cit.*, p 35.

⁶⁵ Pictet J S., *Commentary on the Geneva Conventions of 12 August 1949*, Volume III, Geneva 1960, cited in Moir L, *op. cit.*, p 35.

apply where the conflict was waged within the borders of a single State without any import from outside. An internal armed conflict is defined in clear terms as “a confrontation between the existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms within national territory and reaches the magnitude of an armed riot or a civil war”.⁶⁷ The ICTR seemed to touch this point before abandoning it in *Musema Case*. The Trial Chamber considered that:

the expression ‘armed conflict’ introduces a material criterion: the existence of open hostilities between armed forces which are organised to a greater or lesser degree. Internal disturbances and tensions, characterised by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organised armed groups within the territory of a single State⁶⁸.

Taking into account the meaning of the term “break out”, which means, “begin suddenly”, a “non – international armed conflict” can be defined by reference to its starting point and the affiliation of the forces that are involved. At this stage there is no foreign intervention whatsoever; the sudden eruption of the conflict is confined within the borders of a single State. Whether the warring forces receive aid from other states is another issue. In fact many delegations at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts contended that external assistance given to the parties to the conflict or the presence of foreign elements within the armed forces of the Parties to the conflict does not change the character of the conflict to become one of an international character⁶⁹. This should be understood in the sense that the conflict is taking place within the borders of a state and that it broke out from within those borders. Whether the warring parties receive aid or foreign elements fight on either side does not change the character of the conflict.

⁶⁶ *Akayesu*, (TC), par 620 in fine; *Musema*, (TC), par 249 and 256; *Rutaganda*, (TC), para 93.

⁶⁷ Fleck D, op. cit., para 210, p 211.

⁶⁸ *Musema*, (TC), par 248, see also in the legal findings in the *Akayesu case* where the Trial Chamber used the term “outbreak of” but immediately abandoned it. The sentence read as follows: “as stipulated earlier in this judgment, this implies that Akayesu would incur individual responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the **outbreak of**, or otherwise directly engaged in the conduct of hostilities.”

⁶⁹ ICRC, *Report, n137* particularly the Proposal submitted by the experts of Indonesia, CE/COM II/16, p 34.

This was not the case for example, where a conflict was initiated from Uganda and imposed on Rwanda in October 1990 and lasted four years.⁷⁰ This departing point might have been sufficient to internationalise the conflict, contrary to the ICTR's finding that "it was a matter of common knowledge that the conflict in Rwanda was of an internal non-international character"⁷¹. The difficulty in assessing realistically the conflict in Rwanda is due to the lack of a definition of an "armed conflict not of an international character". IHL was only concerned by interstate conflicts on one hand and internal conflicts on the other hand; it did not deal with a mixed situation as the one in Rwanda.

In an attempt to characterise that conflict a test needs to be applied. The primary test for a better characterisation would be the conflict's starting point and the state of affiliation of the forces involved, although other posterior factors, like foreign assistance or land occupation, may also be relevant. It is for instance stressed that the fact of being a citizen or claiming such citizenship plays little role in defining the nature of the conflict, at least it does not suffice when the conflict is waged from outside and later confined in one single state. What needs to be looked at first and foremost is the location where the conflict was initially conceived regardless of who was involved and where it was exported.

2.3 Serious violations of IHL

The violations that are addressed by IHL applicable in non-international armed conflict are "serious violations" of this law which, as gross violations are encountered in the case of international armed conflict. This distinction, however, is more one of terminology rather than substance. The Statute of the International Criminal Court (ICC) uses indistinctly the

⁷⁰ "On 1 October 1990, the Ugandan army invaded Rwanda under the disguise of an internal rebellion by the Rwandan Patriotic Front (RPF) led by the Rwandan-born Ugandan general Fred Rwigema. At that time, general Paul Kagame was pursuing military studies in USA as a Ugandan military officer; in fact, he was the Deputy Chief of Military Intelligence in the Ugandan government's army (...). When gen. Fred Rwigema died in the end of October 1990, Major Paul Kagame returned to Uganda and took charge of the RPF" Rally for the Return of Refugees and Democracy in Rwanda, "No Arms Nor Impunity For Suspected Rwandan War Criminals On Power," Press Release No. 4/2001 <http://www2.minorisa.es/inshuti/rdr26.htm>, quote and footnotes from James Stewart G., "Towards a single definition of armed conflict in international humanitarian law: A critique of Internationalized armed conflict", in *International Review of the Red Cross*, Volume 85, No. 850, June 2003, pp 313 – 350, at p333.

⁷¹ *The Prosecutor v. Ntagerura et al.*, ICTR – 99 – 46 – T, July 4, 2002, "Oral decision", Transcript, p. 9.

term “serious violations” even in the case of international armed conflicts.⁷² In the *Musema Case*, citing earlier decisions in *Tadic* and *Akayesu*, the Trial Chamber understood the phrase “serious violation” to mean “a breach of a rule protecting important values which must involve grave consequences for the victim⁷³”. In the *Kayishema and Ruzindana Case* the Chamber found that it was

a qualitative limitation of its competence and the phrase ‘serious violations’ should be interpreted as breaches involving grave consequences. The list of prohibited acts, which is provided in Article 4 of the ICTR statute, as well as in Common Article 3 and in Article 4 of Protocol II, undeniably should be recognized as serious violations entailing individual criminal responsibility.

All of these positions are more theoretical than practical. They do not assist in assessing whether the accused actually committed a “serious violation” and this can not be deduced from the wording of Common Article 3 or Additional Protocol II alone without factual evidence and assessment of it. It is quite understandable that committing either of the crimes listed under these provisions is a serious offence. A fact-finding judge should arrive at establishing the actual fact committed and assess its merit. In *Aleksovski case* The ICTY embarked on this exercise following a contention by the defense. The Appeals Chamber held that

the Appeals Chamber, having considered the various acts for which the Appellant was convicted, can find no reason whatsoever to doubt the seriousness of these crimes. Under any circumstances, the outrages upon personal dignity that the victims in this instance suffered would be serious. The victims were not merely inconvenienced or made uncomfortable – what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such⁷⁴.

Better expressed, however, was the view of the Trial Chamber in this case where it considered that the seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the

⁷² article 8(2) (b); 8(2) (c); 8(2) (e) of the Rome Statute of the International Criminal Court, as corrected by the *procès-verbaux* of November 10, 1998 and July 12, 1999.

⁷³ *Musema*, (TC), at. para 286; *Semanza*, (TC), para 370.

⁷⁴ *The prosecutor v. Zlatko Aleksovski*, Case No IT-95-14/1-A, March 24, 2000 para 37.

Statute (of ICTY). The form, severity and duration of the violence and the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed. In other words, the determination to be made on the allegations presented by the victims or expressed by the Prosecution largely rest on the analysis of the facts of the case⁷⁵.

It is upon a Trial Chamber to assess a particular case to find whether an allegation is serious enough to amount to a “serious violation” taking into account all the evidence presented. The finding of the Trial Chamber in the *Aleksovski case* is just an indication of some criteria that might be relied upon to adjudicate allegations of serious violations. The seriousness should be decided when assessing the merit of each and every crime charged in the indictment regardless of other crimes for which the accused must answer because each crime needs its own specificity.

2.4 Nexus between violations and armed conflict

For their applicability, both Article 3 Common to the four Geneva Conventions and Additional Protocol II require that the alleged violations be committed in the context of an armed conflict. It is a question of establishing whether the offence was closely connected to the conflict, what is commonly called a *nexus*.

In the *Akayesu Case*, the Trial Chamber held that “other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict⁷⁶”. This sentence may suggest that the link be established between the person (the alleged violator) and the conflict or at least with one of the belligerents. This misleading finding resulted from a false interpretation of the Geneva Conventions where the Trial Chamber concluded that these

legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. The chamber considered that this view is very restrictive and included “individuals, who are

⁷⁵ *The prosecutor v. Zlatko Aleksovski*, Case No IT-95-14/1-T, June 25, 1999, para.57.

⁷⁶ *Akayesu*, (TC), para 633 in fine.

legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts⁷⁷.

It further supported that to hold *Akayesu* criminally responsible, the Prosecutor must prove that the accused acted for either the Government or the RPF in execution of their respective objectives⁷⁸. The Trial Chamber emphasised this point in holding that *Akayesu* would incur individual criminal responsibility for his actions if it was proved that he played some role in the launching of the conflict or were a member of either force or were mandated to so act⁷⁹.

Article 3 Common to the Geneva Conventions does not require specific categories or groups of potential violators. There is nothing in Common Article 3 that suggests that such a view was intended by the drafters of the article. There is only one instance where it can be said that a certain category of persons was addressed. That is in Additional Protocol II, where “it is prohibited to order that there shall be no survivors⁸⁰”. Obviously, only persons (not necessarily commanders) in position of authority can “order”. Apart from this phrase, article 13 of the Protocol provides that the “civilian population shall enjoy general protection against the dangers arising from military operations”. This article contains rules that shall be observed but it does not say by whom. The suggestion by the Appeal Chamber that the addressees “will probably have a special relationship with one party to the conflict⁸¹” is not apparent in the text. The only conclusion that can be drawn is that they are imposed on everybody. Cases decided by the *ad hoc* Tribunals have shown that more civilians are accused of violation of this piece of IHL⁸². The whole of part IV of the Protocol is written

⁷⁷ *Akayesu*, (TC), para 631.

⁷⁸ *Akayesu*, (TC), para 640.

⁷⁹ *Akayesu*, (TC), para 640 in fine.

⁸⁰ See Protocol II, in article 4 (1).

⁸¹ *Akayesu* (AC), June 1, 2001, para 445.

⁸² For example Jean-Paul *Akayesu*, former burgomaster (mayor) of the Taba commune, Ignace *Bagilishema*, former burgomaster of the *Mabanza* commune; Jean-Bosco *Barayagwiza*, Jean *Kambanda*, former prime minister of the Interim Government of Rwanda; Clement *Kayishema*, former prefect of *Kibuye* Prefecture; Alfred *Musema*, former director of the *Gisovu* Tea Factory and economic leader in his prefecture; Ferdinand *Nahimana*, Hassan *Ngeze*, Eliezer *Niyitegeka*, former minister of information of Rwanda’s Interim Government, Elizaphan *Ntakirutimana*, a senior pastor of the Seventh-Day Adventist Church, Gerard *Ntakirutimana*, a medical doctor practicing at the *Mugonero* Adventist Hospital, Georges *Ruggiu*, a Belgian journalist, Georges *Rutaganda*, former second vice-president of the youth wing of the *Interahamwe* militia, Obed *Ruzindana*, former businessman in Kigali, Laurent *Semanza*, former burgomaster of *Bicumbi* commune, Omar *Serushago*, a

impersonally. The word “attack” that is used should not suggest that only military personnel or anybody appearing in an official capacity, be targeted as such.

The nexus that needs to be established is not the one between the author of a violation and the armed conflict, but rather between the acts of the perpetrator and the conflict. This was the finding of the ICTY in its judgment in the cases of *Dario Kordic* and *Mario Cerkez*, where it held that “although the acts or omissions must be committed in the course of an armed conflict, the nexus which is required is between the Accused’s acts and the attack on the civilian population”⁸³.

Not all unlawful acts occurring during an armed conflict are subject to IHL. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law. The Trial Chamber will determine whether such a connection exists between the acts allegedly perpetrated by the accused and the armed conflict⁸⁴. In *Kunarac*⁸⁵, the ICTY Trial Chamber concluded that Muslim civilians were killed, raped or otherwise abused both as a direct result of the armed conflict, and because the armed conflict apparently offered blanket

former *de facto* leader of the *Interahamwe* in *Gisenyi* Prefecture, Sylvestre *Gacumbitsi*, former mayor of *Rusumo*, Jean de Dieu *Kamuhanda*, former Minister of Education in the interim Government, Emmanuel *Ndindabahizi*, former Finance Minister in the Interim Government, André *Ntagerura*, former Minister of Transport as well as Emmanuel *Bagambiki*, former prefect of *Cyangugu* Prefecture. Up to date only Samuel *Imanishimwe* was found guilty of violation of Common Article 3 and Additional Protocol II pursuant to his status as a commanding officer and lieutenant in the former Rwandan Armed Forces. But the reasons for findings of not guilty in relation to the civilian are not their civilian status but rather some other legal issues which are not unanimous to the judges. For the ex-Yugoslavia, most of the accused and convicted are civilians *Zlatko Aleksovski* was commander of the prison facility at *Kaonik*, *Zejnir Delalic*, *Hazim Delic* was Deputy Commander of the prison camp, *Damir Dosen* was a guard shift leader, *Dragan Kolundzija* was a guard shift leader at the *Keraterm* camp, *Dario Kordic* was a regional Croatian Democratic Union (HDZ) leader, *Milorad Krnojelac* was the former warden of the *Foca Kazneno-Popravni Dom*, *Biljana Plavsic* was a member of the Presidency of Republika Srpska, *Dusko Tadic* was the former President of the Local Board of the Serb Democratic Party (SDS) in *Kozarac*. It is worthy to note that ICTY has convicted more military personnel than ICTR did. But taking into account the number of detainees of ICTR (70 by the time of writing), the military personnel is the minority even those on trial or awaiting Trial (Colonel *Bagosora*, Maj Gen Augustin *Bizimungu*, Maj Gen Augustin *Ndindiliyimana*, Brig Gen Gratien *Kabiligi*, Lt Con Anatole *Nsengiyumva*, Maj Aloys *Ntabakuze*, Maj François Xavier *Nzuwonemeye*, Capt Innocent *Sagahutu*, Col Aloys *Simba*, Col Tharcisse *Renzaho*, Col Ephrem *Setako*, Lt Col Tharcisse *Muvunyi*, Lt Ildefonse *Hategekimana*, Lt Samuel *Imanishimwe*, Lt Col Alphonse *Nteziryayo*) 15 persons among about 70 arrested persons clearly show that the military personnel is not the target.

⁸³ *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No IT – 95 – 14/2, T, February 26, 2001, para 32.

⁸⁴ *The Prosecutor v. Zlatko Aleksovski*, case No IT – 95 – 14 / 1 – T, June 25, 1999.

⁸⁵ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT – 96 – 23 – T & IT – 96 – 23/1 – T, February 22, 2000.

impunity to the perpetrators. This finding emphasises the fact that the underlying crimes were not only made possible by the armed conflict but they were very much part of it⁸⁶.

The Trial Chamber in *Kayishema and Ruzindana* case stressed this specificity of *nexus* by holding that:

the term “*nexus*” should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists⁸⁷.

In the *Celebici*⁸⁸ case, however, the Trial Chamber noted that such a direct connection to actual hostilities is not required in every situation⁸⁹. The Chamber meant that there need not have been actual armed conflict in a specific location or at an exact time-period when the acts alleged in the indictment were committed. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place⁹⁰. The requirement of *nexus* is satisfied if the crimes are committed in the aftermath of the fighting, until the cessation of hostilities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting⁹¹.

⁸⁶ *Kumarac*, (TC), para 568.

⁸⁷ *Kayishema and Ruzindana*, (TC), para 188.

⁸⁸ *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Essad Landzo*, “*Celebici*”, Case No IT – 96 – 21 – T, November 16, 1998.

⁸⁹ *Celebici*, (TC), para 193.

⁹⁰ *Kumarac*, (TC), para 568.

⁹¹ *Ibidem*, para 568.

2.5 The 1990 – 1994 Rwanda armed conflict: an international legal perspective

2.5.1 Conflict in 1990 – 1994: origin, magnitude of the conflict and implications for IHL

Arguably the cases before the ICTR originated from the invasion of Rwanda on October 1 1990. The conflict that lasted four years was, to a large extent, international and not purely internal in character as is actually believed. Rwanda was attacked with disregard for international legal instruments and principles for the peaceful settlement of disputes⁹². Particularly the preamble to General Assembly Resolution 2625 of 1970 emphasises the conviction of nations that the strict observance by State of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security⁹³.

Both warring parties targeted civilian populations⁹⁴. The Rwandan Government thought that by violating the rights of some of its citizens (mainly the Tutsi ethnic group) who were believed to support the invaders was a better way to counter the offensive. On the other hand, the RPF thought that by killing the civilian population, mainly and exclusively from the Hutu ethnic group, it was going to strengthen its positions in what it believed to be a Hutu stronghold regime.

⁹² See for instance *Definition of Aggression*, United Nations General Assembly Resolution 3314 (XXIX), 2319th plenary meeting, 14 December 1974; and the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Dec. A/5217 (1970), at 121.

⁹³ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Dec. A/5217 (1970).

⁹⁴ See for instance the *Final Report of International Commission of Investigation on Human Rights in Rwanda, since October 1, 1990*. (January 7-21,1993), p3; *Letter dated October 1, 1994 from the Secretary-General addressed to the President of the Security Council*, where the Secretary General of the UN remarked on page 2 of the letter that:

I wish to draw your attention to the conclusion reached at this stage by the commission, namely that, in the period under consideration; (a) Individual from both sides to the armed conflict have perpetrated serious breaches of international humanitarian law in particulars of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II Additional to the Geneva Conventions and relating to the protection of Victims of non- international Armed conflict of 8 June 1977.

The process of democratic reform had just begun when the RPF unilaterally launched an attack. Out of the approximately seven thousand soldiers who crossed the frontier from Uganda, several thousands were Rwandan refugees who were absent without leave from the Ugandan Army⁹⁵.

A certain number of writers and political analysts concur on the issue of the origin of the conflict that broke out from Uganda on the October 1, 1990. It is the mandate of the Tribunal to prosecute the alleged perpetrators of crimes that were committed pursuant to this attack. Among other justifications of the establishment of ICTR under Chapter VII of the United Nations Charter, was that the violations committed and the situation as a whole, continued to constitute a threat to international peace and security.

In *Prosecutor versus Jean Paul Akayesu*, Dr. Alison Desforges in the Prosecutor's witness box repeated to the Chamber that the Rwandan Patriotic Front "was organised in *Kampala*" and that

The Uganda National Resistance Army had a great deal to do with the individuals in the organisation. I don't know that there was any organisation-to-organisation kind of link in any formal sense. But certainly many of the people who later emerged as important in the RPF had initially served in the NRA, the Ugandan Army.⁹⁶

Answering a question about the base of RPF, she responded that it recruited among the Rwandan refugee population, primarily in Uganda, but also drew, particularly as time went

⁹⁵ *Final Report of International Commission of Investigation on Human Rights in Rwanda*, since October 1, 1990, op. cit., p 6; the same figure of invaders is advanced by the High Commissioner for Human Rights in his report as follows: "in October 1990, the Rwandan Patriotic Front (RPF) invaded the country from Uganda with a force of some 7,000. The RPF is composed mainly of Tutsi refugees, many of them former members of the Ugandan armed forces." *Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of May 11 – 12, 1994*, E/C.4/S – 3/3, May 19, 1994, para 4.

⁹⁶ Transcript of court proceeding, November 12, 1997, p 97, line 15- 25 and p 98, line 1 –2. See also Rwanda: The Rwandan Patriotic Front's Offensive, (V), *Defense intelligence report*, (J2-210-94), May 9 1994. In this secret US Department of Defense report it is stated that:

The RPF is a political organisation, originally based in Western Uganda (...). The RPF was founded as an opposition party in 1979 as the Rwandaise Alliance Nationale de Unité (RANU). By 1987, expatriates Rwandans of Tutsi ancestry who had served in the Ugandan Army dominated the organisation and changed the name to the Rwandan Patriotic Front. These military experiences of RPF cadre, coupled with the link to the current Ugandan government, are important factors in RPF gains over the past few weeks.

on, Rwandan refugees from other parts of the Great Lakes Region and also from within Rwanda itself. It also attracted several leading Hutu dissidents who had left Rwanda after some form of opposition to Habyarimana, and a certain number of hangers on of various kinds who were not Rwandans, i.e. either Ugandans, Zairians or Tanzanians⁹⁷.

Dr Alison Desforges continued:

On October 1st, 1990, they crossed the border and moved south very, very rapidly, and occupied a small amount of territory for approximately one month. They were then pushed back across the border. And in this first phase in the month of October, they operated as a more or less conventional military, following a conventional military strategy. Once they were pushed back across the border, they had suffered significant losses⁹⁸.

On September 21, 2001, Pr. *André Guichaoua* testified in Trial chamber III of the ICTR in what is known as the *Cyangugu case*

Now what I would like to give a clear answer to is that, when I insist on the use of the term "civil war" what I mean to say is that the war involved first and foremost, Rwandans. The Rwandans were in two political groups who relied on military resources. Perhaps at some point in time, or maybe through the internal conflict, there may have been external assistance, in particular the assistance from the Ugandan army. There is no doubt about that. But what is at stake, what is clearly at stake, in my opinion, from an analytical point of view, is to underscore that those who were fighting were first and foremost Rwandans, and they were fighting for stakes in Rwanda; namely, to find a solution to the refugee problem which had not been solved for 30 years⁹⁹.

What is in contention is not that the attackers were not Rwandans. Most of them had Rwandan allegiance. Everyone would condemn the attitude of the Ugandan government or that of President Museveni for allowing a military force of some 7000 men to attack a sovereign country in disregard of international best practices and standards. Uganda gave solid support for an RPF takeover in Rwanda. Towards July 1993, the Ugandan army sent

⁹⁷ Transcript of court proceedings, November 12, 1997, p 98, line 19-25; p 99, line 1 –7.

⁹⁸ Transcript of court proceedings, November 12, 1997, p 101, line 15 – 25.

⁹⁹ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No ICTR – 99 – 46 – T, (Cyangugu Case), Transcript of court proceedings, September 21, 2001, p 11, line 2 –12.

troops to fight alongside the RPF. Tanzanian authorities tape-recorded president Museveni as he was commanding the RPF soldiers not to sign a peace agreement with the Rwandan government. Rather, he said, the RPF should return to the battlefield and resume fighting immediately. In his own words, Museveni said: “Don’t sign the peace agreement. I want you back at *Mulindi* (RPF headquarters in Rwanda) immediately”.¹⁰⁰

2.5.2 Nature of the Rwanda armed conflict

Views may differ on the character of the conflict in Rwanda that lasted four years. Depending on the legal framework on which one bases his analysis, the conflict can be characterised as international or internal. It would not, however, be fair to qualify it as solely internal disregarding its international dimensions or setting aside some piece of general international law that applies.

2.5.3 International armed conflict or aggression

One major aspect of the conflict was overlooked. The Rwandan conflict, similar to the later conflict in the Democratic Republic of Congo (DRC), was characterised by a flagrant violation of many rules and principles adopted by the UN and the OAU.¹⁰¹ In the case of the DRC, Professor *Mbata* was right to highlight a number of international instruments¹⁰² that were deliberately violated in that conflict. The commission of experts established pursuant to SC resolution 935 found the only international character of the conflict to be that there had been serious repercussions on the social and political welfare and internal stability of neighbouring States.¹⁰³ The factual basis for such a finding was that the influx of refugees

¹⁰⁰ *The Shariat*, September 6 -12, 1994 quoting Tanzanian newspaper *The Mirror*, May 1994, cited in Crawford B, “Rwanda: Myth and Reality”. The article was taken from <http://www.africa2000.com/INDX/rwanda.htm>, which was last modified on December 11, 1996, accessed on June 11, 2005.

¹⁰¹ Mbata A B M, “Conflict in the Democratic Republic of Congo: An international legal perspective”, in *South African Yearbook of International Law*, Vol. 28, 2003, pp 82 – 109, at p 95.

¹⁰² UN Charter, General Assembly Resolution on the Rights and Duties of States, GA RES 375(1949); Declaration on the Granting of Independence to Colonial Countries and Peoples, GA RES 1514 (XV) 1960; Declaration on the Inadmissibility of Intervention in Domestic Affairs of states and the Protection of their Independence and Sovereignty, GA RES 2131 (1965) December 21, 1965; Declaration on the Principles of International Law concerning Friendly relations and Cooperation among States in Accordance with the Charter of the United Nations, GA RES 2625 (XXV) (1970) October 24, 1970; Definition of Aggression, GA RES 3314 (XXIX) 1974, and so forth, quoted from André Mbata B Mangu, op cit, pp 95 – 98.

¹⁰³ *Final Report of the Commission of Experts established pursuant to Security Council resolution 935* (1994), S/1994/1405, 9 December 1994, para 58 and 62, para 109.

into those states created significant problems and that the conflict could be seen as threatening the international security within the meaning of Chapter VII of the UN Charter.¹⁰⁴ It is worthy to note that what the commission wrote happened after July 1994 after the war was over.

The commission was, however, of the opinion that these aspects did not alter the basic character of the conflict in Rwanda during the period April 6 to July 15, 1994 as predominantly non-international in character.¹⁰⁵ The commission also said that the third state involvement in the conflict entailed only peacemaking and humanitarian functions rather than belligerent action.¹⁰⁶ This opinion is one-sided. It does not address the origin of the conflict. It instead confines the conflict to the period running from April 6 to July 15, 1994. The Commission did not look at the whole timeframe it was supposed to investigate namely the whole year 1994. The analysis of the Commission was superficial and did not say anything about the warring parties in particular to find whether those parties could impartially be considered as already existing components of the then Rwandan structures. The commission did not either say anything about the involvement of Uganda. The commissioners had the information about the involvement of Uganda but they disregarded that information, supposedly for political reasons.

If one considers all the factual evidence surrounding the conflict, it would be fair to conclude that the war in Rwanda was an aggression as provided for in the General Assembly Resolution 3314 of December 14, 1970.¹⁰⁷ The resolution defines 'aggression' as the use of force of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition".¹⁰⁸ The definition contains a non-exhaustive enumeration of acts, which, regardless of a declaration of war, shall qualify as acts of aggression.¹⁰⁹ Among the acts condemned as falling within this concept is the sending by and

¹⁰⁴ Ibidem.

¹⁰⁵ Ibidem.

¹⁰⁶ *Final Report of Expert*, para 108.

¹⁰⁷ General Assembly Resolution 3314 (XXIX) of 14 December 1974: Definition of aggression.

¹⁰⁸ Resolution 3314, art 1.

¹⁰⁹ Art 3 – 4.

on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Since it is within the discretion of a state's discretion as to what entity it recognises as a state, it is clear that the support given to the military forces of (even) national liberation movements or other revolutionary groups fall under this definition.¹¹⁰

However – and this is specifically emphasised – nothing in the definition could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of people forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹¹¹, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the charter and in conformity with the above-mentioned Declaration.¹¹² It is quite obvious that the support given to RPF when launching its war from Uganda does not fall within the provisions of article 7 of the Resolution defining the term “aggression”. Specifically, the Ugandan attitude in allowing the RPF forces to cross the borders constitutes an aggression by the same government in terms of article 3(g) of Resolution 3314, as it reads and referred to above.

And article 5 states that “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression”. The Ugandan act violates the first principles of Resolution 2625 that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations”.

In developing this principle, it is further emphasised that “every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands,

¹¹⁰ Green L C, op. cit., p 60

¹¹¹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States I accordance with the Charter of the United Nations*, (General Assembly Resolution 2625 (XXV) 1970).

¹¹² Art 7.

including mercenaries, for incursion into the territory of another State”. Under Article 6(a) of the Charter of the International Military Tribunal annexed to the London Agreement in 1945¹¹³, the “planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or war in a common plan or conspiracy for the accomplishment of any of the foregoing” are crimes against peace entailing individual responsibility.¹¹⁴ This article was interpreted in the judgment of the Military Tribunal at *Nuremberg* as declaratory of modern international law, which regarded war of aggression as a grave crime.¹¹⁵ The Tribunal in the *High Command* case stressed that the nature of war as aggressive or otherwise is determined by factors linked to its initiation.¹¹⁶ It was also opined that waging war of aggression is a continuous offence.¹¹⁷ Many arguments have been advanced to deny the involvement of the Government of Uganda in the conflict in Rwanda. They were designed to deceive, taking advantage of a certain international and regional state of affairs as well as the current stage of development of some principles of international law.

Whether RPF combatants acted on behalf of Uganda or were sent by that State is a matter to be determined in accordance with current international jurisprudence. In the *Blaskic* Case, the trial Chamber held that

An armed conflict which erupts in the territory of a single State and which is thus at first sight internal may be deemed international where troops of another State intervene in the conflict or even where some participants in the internal armed conflict act on behalf of this other State. The intervention of a foreign State may be proved factually. Analysing this second hypothesis is more complex. In this instance, the legal criteria allowing armed forces to be linked to a foreign power must be determined. This link confers an international nature upon an armed conflict which initially appears internal¹¹⁸.

¹¹³ Charter of the International Military Tribunal (IMT), in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, August 8, 1945, 58 Stat.1544, E.A.S., No 472, 82 U.N.T.S. 280.

¹¹⁴ Dinstein Y, *War, Aggression and Self-Defense*, second edition, Cambridge University Press, 1994, p118.

¹¹⁵ International Military Tribunal (Nuremberg), Judgment (1946), 1 I.M.T.171, 219 -23, cited in Dinstein Y, *op. cit.*, p 119.

¹¹⁶ U.S.A. v Von Leeb et al. (« *The High Command Case* ») (Nuremberg, 1948), 11 N.M.T. 486, quoted in Dinstein Y, *op cit* p 137.

¹¹⁷ *Id.*

¹¹⁸ *Blaskic*, (TC), para76.

Here it is a situation whereby the conflict erupts within the borders of a single State and is thereby confined within those borders. The outside intervention comes afterward. But the case study, namely the Rwandan conflict, is different because the conflict was initiated from Uganda and the Ugandan army, under the guise of the Rwandan allegiance of some combatants, actively participated in that conflict. They were acting on behalf of the Ugandan government. There is therefore ample proof to characterise the conflict as international pursuant to this launching of the war.

It was also claimed that Rwandan refugees have been living outside of their motherland for quite a long time. This situation, it is alleged, gave them the right to return to their country by any means, including by force. Whereas no one can agree with the idea that war was a last resort, there is also a way to quote article 3 of the African Convention Governing the Specific Aspects of Refugee Problems in Africa to which Uganda is a signatory member¹¹⁹. This article prohibits subversive activities in these terms:

Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as to measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

The question of Rwandan refugees was not neglected at all even though the search for a solution was undertaken with undue delay, i.e. after 30 years and pursuant to pressure against the then President of Rwanda, Juvénal Habyarimana. This fact was recognised in the Report of the Panel of Eminent Personalities established by the Organisation of African Unity.¹²⁰

¹¹⁹ Uganda signed the African Convention Governing the Specific Aspects of Refugee Problems in Africa on 10 September 1969 and ratified it on 24 July 1987. It is also important to note that President Museveni at the time of the invasion was the Chairman of the Organisation of African Unity on the period July 1990 – July 1991.

¹²⁰ As pressure for democratization increased, however, pressure on Habyarimana to moderate this stance arose from foreign donors, UN agencies, and Uganda. Visits between Habyarimana and Museveni initially led nowhere, notwithstanding the latter's argument that it was in Habyarimana's own interests to address the grievances of the Rwandan Tutsi in exile. Finally, the two governments agreed to establish a joint commission on Rwandan refugees in Uganda to determine how many wanted to return and what capacity Rwanda had to absorb them; a Rwandan national commission was established as well. However, observers still doubted

The option to attack, as the only ultimate and viable solution¹²¹, clearly and deliberately violates all international best practices and legal regimes. The overall responsibility rests with the Ugandan Government because RPF was not yet a state entity. That's where there are unsolved questions. The Panel of Eminent Personalities evasively questioned this invasion in properly stating that:

Inevitably, there are many questions about the invasion's timing, motives, appropriateness, and consequences. Equally inevitable are profound differences of opinion. This matters, since part of the propaganda war still being waged today revolves around the legitimacy of the invasion of October 1, 1990, and, therefore, the legitimacy of today's government¹²².

2.5.4 Non-international conflict

The supporters of the internal character of the conflict base their position on the nationality of the attackers many of whom were Rwandans. Professor *Mbata* considers that one of the prominent features of a rebellion is that some elements into the state, generally the army or part of it, revolts or takes up arms against the government in an ultimate effort to effect regime change.¹²³ He further argues that recourse to revolution, *coup d'état*, or rebellion is not prohibited in international law since the change of government, whatever the manner, is considered an internal affair, an exercise of self-determination.¹²⁴ He also supports the idea of the nationality of attackers in justifying the non-international character of the conflict that erupted in DRC in 1996 under the leadership of Laurent Desiré *Kabila*. He is quite right because, although some factions received foreign support, most warlords were incontestably Congolese citizens and launched the war on the DRC soil. Foreign interventions on the side of the rebels (Uganda, Rwanda and Burundi) came after the war had been initiated by

Habyarimana good will as he continued adamantly to refer to the Tutsi outside the country as emigrants instead of refugees, implying a voluntary decision to leave Rwanda. Whether it was a charade or not, the commission functioned. In fact, a visit to Rwanda by a group of refugees was scheduled for October 1990, but by that time, it was already too late. Rwanda's inflexibility and unreliability had reinforced the arguments of the militants against the moderates within the Tutsi leadership in Uganda. On October 1, 1990, the fateful invasion began when several thousand soldiers, mostly well trained and well armed from their years with Museveni, crossed the border into Rwanda", *Report of Panel of Eminent Personalities*, (2000), para 6.7 in fine to 6.9.

¹²¹ Point 8 of the Preamble to the African Convention Governing the Specific Aspects of Refugees Problems in Africa provides that "all the problems of our continent must be solved in the spirit of the Charter of the Organisation of African Unity and in the African context."

¹²² *Report of Panel of eminent Personalities*, (2000), para 6.10.

¹²³ Mbata A B M, op. cit. p 94.

¹²⁴ *Ibidem*.

Congolese within the borders of the then Zaire. This is true for the armed conflict which broke out against the Kabila government and not the one that brought Kabila to power.

The situation in the DRC was, in many respects, distinguishable from the one prevailing in Rwanda from October 1990 to July 1994. No element in the state or in the army rebelled against the government of Rwanda in 1990. There was not even an attempt by anyone to take advantage of the existing state of war after October 1990 to revolt against the government. Instead the government and its entire army were battling against the military intervention into Rwanda from Ugandan soil by the joint efforts of the Rwandese Patriotic Army (RPA) and the Ugandan Army (National Resistance Army - NRA).¹²⁵

The other idea was to label RPF as a dissident armed force. This idea does not help either. “Dissident” is not legally defined. Literally dissidents are people who oppose the particular regime under which they live, often through peaceful means, and who, as a result, suffer discrimination and harassment from the authorities. Dissidents may, for example, lose their jobs or be banished to certain areas of the country. They tend to take a moral rather than an overtly political stance in their opposition¹²⁶.

If the RPF were to be really called a dissident armed force, it would, in the light of this definition, have been a part of the Rwandan Government, more precisely a part of its army. The definition specifies that dissidents oppose the “regime under which they live”. The evidence brought before the ICTR contradicts the argument of the ICTR Chambers that RPF was a dissident armed force. There are three realities that do not need lengthy discussions but acceptance.

The first reality is that RPF was mainly composed of Rwandan Tutsi refugees who evolved in neighbouring States particularly in Uganda where some held senior military positions. The

¹²⁵ International Centre for Peace and Reconciliation Initiative for Africa (ICPCRIA), Prof Agola Auma-Osolo, March 25, 1995 *The Rwanda Catastrophe: Its Actual Root-Cause and Remedies to Pre-Empt a Similar Situation In Rwanda*. p 25. The RPF is the virtual creation of President Museveni of Uganda. The RPF and the Ugandan resistance army mirror each other. Their joint efforts succeeded in the overthrow of President *Milton Obote* in 1985, quoted in Philpot J, supra note 17.

¹²⁶ Definition from Crystal D, *Cambridge Encyclopedia*, Cambridge University Press, 1990.

second one is that RPF launched its attack from Uganda and retreated in Uganda every time the RAF defeated it. The last one is that there was a peace accord signed on August 4, 1993 in Arusha in the United Republic of Tanzania between the Rwandan Government and the RPF that formally ended the war, but which was never implemented. The allegiance of some RPF combatants to the country of Rwanda is acknowledged, but regarding its armed action, it would be hardly acceptable to purport that it was a dissident armed force in the Rwandan context of October 1990 through July 1994. The following evidence heard by the ICTR will substantiate this assertion.

Professor Filip *Reyntjens*¹²⁷ who appeared as an expert witness in the *Rutaganda Case* testified that the RPF attack came from Uganda. Moreover the troops of the RPF had served in the Ugandan army and were, in fact part of it.¹²⁸ To illustrate this with a specific example, the military commander of the RPF at that time, Fred *Rwigema* had been both the deputy head of the Ugandan army as well as Ugandan deputy minister of defense up to November 1989. So there was a link between the two, a very strong link¹²⁹. *Reyntjens* added that toward the end of October 1990, these forces were disorganised following the death of their commander Fred *Rwigema*, and they had to retreat back to Uganda¹³⁰. From there they were

¹²⁷ Belgian Filip *Reyntjens* was, at the time of his testimony, a professor at the University of Antwerp, and a part-time professor at the University of Louvain and the University of Brussels. He appeared in *Rutaganda's* case for examination - in - chief, on October 13 and 14, 1997 and for cross-examination on November 24, and 25, 1997.

¹²⁸ To put it clearly, it was the National Resistance Army (NRA).

¹²⁹ Transcripts of court proceedings, October 13, 1997, p 73, line 19- 24, p 74, line 1 – 6.; see also International panel of eminent personalities, para 6.9 and 6.10 where it is written that: “On October 1, 1990, the fateful invasion began when several thousands soldiers, mostly well trained and well armed from their years with Museveni, crossed the border into Rwanda. Inevitably, there are many questions about the invasion’s timing, motives, appropriateness, and consequences. Equally inevitable are profound differences of opinion. This matters, since part of the propaganda war still being waged today revolves around the legitimacy of the invasion of October 1, 1990, and, therefore, the legitimacy of today’s government”; see also note 6 in Chapter 1[Transcript of court proceeding, November 12, 1997, page 97, line 15- 25 and page 98, line 1 –2.; see also Rwanda: The Rwandan Patriotic Front’s Offensive, (V), *Defense intelligence report*, (J2-210-94), May 9, 1994. In this US Department of Defense report it is stated that:

The RPF is a political organisation, originally based in Western Uganda (...). The RPF was founded as an opposition party in 1979 as the Rwandaise Alliance Nationale de Unité (RANU). By 1987, expatriate Rwandans of Tutsi ancestry who had served in the Ugandan Army dominated the organisation and changed the name to the Rwandan Patriotic Front. These military experiences of RPF cadre, coupled with the link to the current Ugandan government, are important factors in RPF gains over the past few weeks.

¹²⁹ *Rutaganda*, (TC), Transcript of court proceeding, November 12, 1997, p 98, line 19-25; p 99, 1 –7.

¹³⁰ *Rutaganda case*, Transcript, October 13, 1997, p 75, lines 10 – 12.

taken back to the battlefield by Major *Kagame*, who had just returned from the United States where he was studying, as a Ugandan officer, at the *Leavenworth* military academy.

In cross-examination, Professor *Reyntjens* was asked whether at any time and in what manner *Kagame* lost his military rank within the Ugandan army. He answered that “he never lost it officially”¹³¹ and that he (Pr. *Reyntjens*) could not be surprised if, officially speaking, *Kagame* was still an officer of the Ugandan army.

Filip *Reyntjens* testimony clearly shows that there is no link whatsoever between the RPF and any structure of the then government of Rwanda, but rather strong ties existed between RPF and the Ugandan army, thereby with the government of Uganda. As he put it without getting into legal issues, at the time he felt that Uganda had a large responsibility in the invasion.¹³² According to *Reyntjens*, the invasion of Rwanda was a violation of the Charter of the Organisation of African Unity. It also infringed the UN principles that outlaw the aggression of the territory of one state by another¹³³.

It has also been argued that the attackers were deserters from the Ugandan Army. This thesis is not true either. In the first instance President *Museveni* alleged that the authorities were not aware of the invasion and that they would not tolerate it, rather they would punish those deserters by virtue of the Ugandan military law. But it was clear that Major *Kagame*, Major *Bunyenzezi* and many other high-ranking RPF officers, were never prosecuted. Another indication of the knowledge of the attack was the fact that attackers invaded Rwanda equipped with weapons, vehicles, and so forth all belonging to the Ugandan army.

It is finally disputable whether RPF soldiers could not be considered as Ugandans by the mere fact of having belonged to its army. It does not need proof that Major *Kagame*, as earlier stated and voluntarily repeated here, who took over after the death of General Fred *Rwigema* had studied at *Leavenworth* military academy in the United States as a Ugandan officer.

¹³¹ *Rutaganda case*, Transcript, November 24, 1997, p 20, line 21 – 24 and p 21, lines 8 – 12.

¹³² *Rutaganda case*, p 24, lines 17 – 23.

¹³³ *Rutaganda case*, op.cit. p15, lines 17 – 25, and p 16, line 1 – 7.

It is deliberately ignoring this reality if one wonders whether the attackers lost their Rwandan citizenship because evidence is overwhelming that most of the RPF combatants, although of Rwandan origin, could be deemed Ugandans, by the fact of constituting the bulk of its army. At least, the level of authority some senior RPF officers exercised in the Ugandan army was a strong indication that the combatants had strong ties with Uganda. These are facts which were not considered by the ICTR in its various decisions. It can not be blamed on *Reyntjens* that he failed to convince the Tribunal because his role was only to report facts. The Tribunal did not decide on these facts and that is the reason they are raised in this work. The author is of the view that the ICTR failed to determine the nature of the conflict. This idea will be developed more fully later on in the study.

2.5.5 Assessment

Not all ends can justify the use of military force, and not even the best ends can justify the use of any means.¹³⁴ Professor *Mbata* considers the rebels as the liberators of a country if they undertake and succeed in overthrowing the government of the day¹³⁵. This is obviously true when the rebels have no connection whatsoever with a foreign state. Although the RPF defeated the RAF, this fact is not alone sufficient to overcome their origin as a foreign armed force movement. When one looks at the historical background of the Rwandan invasion whose origin goes back to 1979¹³⁶, it would open a window for a wide view of the conflict in its international dimension rather than in its internal one. Setting aside this dimension may suggest that some principles of international law like the state responsibility provision and aggression are purely historical.

The doctrine on state responsibility emphasises that an armed attack by non-state actors can be made attributable to a state if certain prerequisites are met.¹³⁷ According to the laws on

¹³⁴ Møller B, "Kosovo and the Just War Tradition", Paper for the Commission on Internal conflicts at the 18th IPRA Conference in Tamere, August 5 – 9, 2000, p 2.

¹³⁵ Mbata, op cit , p 94.

¹³⁶ See supra note 93 The Rwandan Patriotic Front's Offensive, (V), *Defense intelligence report*, (J2-210-94), 9 may 1994. In this secret US Department of Defense report; See also Prunier G, *Rwanda: la Crise Rwandaise; structure et déroulement*, Writenet (UK), juillet 1994, p 9.

¹³⁷ Gall L., *Self-Defense in International Law and its impact on Human Rights in the Aftermath of Armed Response*, Graduate Thesis, Faculty of Law, University of Lund, Malmö, December 2003, p 1.

state responsibility, a state can be held accountable for actions performed by non-state agents if it is established that an act or omission was considered to be the conduct of the state. The description given is enshrined in Article 3(g) of the *Definition of Aggression*, and can, according to the International Court of Justice (ICJ), be stated to reflect international customary law. States today do not challenge the view that actions by irregular forces can constitute an armed attack. However, the problem and controversy arises when the focus is put on the degree of involvement that is necessary to make an action attributable to the state.¹³⁸ At this stage however every analyst may take a position which might be different from the opinion of the majority provided that the position is substantiated by the facts.

So the conflict that was imposed on Rwanda on October 1, 1990 was launched from and with the support of Uganda. It was in violation of international law and best practice. It is right to call it an aggression, the aggressor being the state of Uganda. Looked from the angle of IHL, particularly Common Article 3 and Additional Protocol II, it is not true to say that the conflict opposed the RAF with the dissident armed forces. RPF combatants were not a dissident force neither were they insurgents. Many of the points cited in an earlier guideline necessary to qualify a conflict as internal, are missing. The piece of IHL that would better apply was the one concerned with international armed conflict if RPF was a national liberation movement which, it actually was not.

¹³⁸ Gall L., op cit, p 19.

Chapter 3: The jurisdiction of the ICTR

The ICTR was established in the aftermath of the mass killing that erupted in Rwanda in 1994. The Tribunal was set up to prosecute the perpetrators of the most serious crimes, namely genocide, and other crimes against humanity, as well as violations of IHL. The Tribunal was established to put an end to impunity and contribute to the process of national reconciliation which would lead to lasting peace in Rwanda.¹³⁹ It is the second *ad hoc* tribunal (after the one established for the former Yugoslavia) and set up to prosecute the violations of IHL committed in Rwanda.

The mandate of the Tribunal encompasses the rendering of justice for all Rwandans and the world, what may basically mean that every aspect of this judicial process must be unquestionably impartial, prompt and effective. But as the ICTR proceeded, more criticisms were made regarding its contribution to the objectives for which it was established. One compelling preliminary observation was that the establishment of an international tribunal could never make up for failure to intervene, and that any contribution of the ICTR should be assessed from that perspective.¹⁴⁰ Another fundamental criticism concerned the one-sided approach of the ICTR. The war that was the main reason for the ensuing human rights violation was a reality that could not be solved in an isolated manner. The fact that only Hutu suspects were prosecuted legitimises the Tutsi invasion that had started that war in 1990. This *modus operandi* would certainly not contribute to solving the Hutu-Tutsi power struggle.¹⁴¹ A court created by the UN must be expected to abide strictly by all the highest standards laid down by the UN itself.¹⁴² Moreover, if justice is seen to be done it will help ensure that the decisions of the Tribunal are accepted by all persons (no matter what their background) in Rwanda and, thus, contribute to national reconciliation.¹⁴³

¹³⁹ Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, AI Index: IOR 40/003/1998, April 1, 1998, p 2.

¹⁴⁰ Van den Herik L.J., *op. cit.*, p 46.

¹⁴¹ Mutua, "Never Again: Questioning the Yugoslav and Rwanda tribunals", in *Temple International and Comparative Law Journal*, 11, 1996, pp 167 - 187, cited in Van de Herik, L.J., *op. cit.*, p 46.

¹⁴² Amnesty International, *op cit.*, p 4.

¹⁴³ Amnesty, *op cit*, p 4.

3.1 Foundational instruments

3.1.1 Security Council Resolution 955

Acting pursuant to its authority under Chapter VII of the UN Charter, the Security Council recognised the situation in Rwanda in 1994 as a threat to international peace and security and established the Tribunal. The Security Council adopted resolution 955 (1994)¹⁴⁴ creating the Tribunal on 8 November 1994. The resolution requires all states to cooperate fully with the International Tribunal and its organs and to take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute.¹⁴⁵ Compliance with the Tribunal is then a legally binding obligation for all UN member states.¹⁴⁶

It was inevitable that the competence of the Security Council itself to set up such a tribunal should be questioned, since no such competence is expressly assigned to it in any part of the UN Charter.¹⁴⁷ Speeding up the process of creating the Tribunal was the justification. However, the imperative of speed prevented any real discussion within the Council, and certain technical shortcomings in the texts could have been avoided if more in-depth debates had been held.¹⁴⁸ Philpot¹⁴⁹ considers that this improvisation can only discredit any effort to create such an international criminal tribunal. Unfortunately the Tribunal for Rwanda improvised in a few short months ignored all previous studies and does not satisfy minimal standards for such an important international court. It is rather an *ad hoc* appendage of the Security Council designed to play an enforcement role with little preoccupation for truth, impartiality and fundamental justice as conceived by the community over the past fifty years.¹⁵⁰ Although these considerations were advanced in October 1995 before the Tribunal undertook any procedure falling within its mandate, it may stand even today. Overseeing selective prosecutions against one part of the alleged perpetrators of serious violations of IHL, professor *Reyntjens* rightly wrote to the Chief Prosecutor ten years later that the ICTR

¹⁴⁴ S/RES/955 (1994), November 8, 1994.

¹⁴⁵ Point 2 of Resolution 955(1994).

¹⁴⁶ Amnesty International, *op. cit.*, p 8.

¹⁴⁷ Tavernier P., "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", in *International Review of the Red Cross*, No 321, p.605 - 621, December 31, 1997.

¹⁴⁸ *Ibidem*.

¹⁴⁹ Philpot J, *op cit.*, p 4.

¹⁵⁰ *Ibidem*, p 4.

risks being part of the problem rather than of the solution.¹⁵¹ Another analyst¹⁵² opined that through criminalising only Hutus, the Tribunal has polarised Rwandan society further still, and sown the seeds of war in the future. The ICTR prosecution has, on many occasions, expressed its intention to investigate RPF cases, but it faced many obstacles posed by the current Rwanda government.¹⁵³ Nevertheless the ICTR is vested with the same judicial authority as any normal tribunal.

3.1.2 Statute of the ICTR

The Statute of the Tribunal establishes its jurisdiction, defines the crimes to be investigated and prosecuted, sets up its structure, stipulates the rights of the accused, and provides for witness protection, the appeal procedure and deals with enforcement of sentences. By setting up both the ICTY and the ICTR, the Security Council reaffirmed that individuals could be held criminally responsible for acts that violate ICL, regardless of whether their national laws criminalise those acts or not. It reaffirmed the responsibility of the international community to hold perpetrators responsible for these crimes under international law. In most provisions the statute of the ICTR is the same as that of the ICTY but with a few significant differences.¹⁵⁴ Unlike the International Criminal Court (ICC), both the ICTR and the ICTY are *ad hoc* Tribunals. The ICC is a permanent court with universal jurisdiction over individual natural persons for the most serious crimes of international concern, namely genocide, crimes against humanity, war crimes and aggression committed after the court's

¹⁵¹ In a letter dated January 11, 2005, Filip Reyntjens after having cooperated with the Tribunal and the Office of the Prosecutor since 1995, consider however that the failure for it to prosecute RPF suspects put him before a moral dilemma.

¹⁵² Crawford B, Rwanda: *Myth and reality*, op. cit, p 12.

¹⁵³ By a press release of December 2000, the prosecutor announced that it wished to investigate RPF. In response, prosecution witnesses refused to cooperate and testify in ongoing cases. In a letter of September 17, 2002 to the Security Council, the Prosecution complained about Rwanda's obstructive position towards the ICTR. The prosecution stated that it had been informed by reliable sources that the lack of cooperation was a direct consequence of its announcements to investigate alleged RPF crimes, UN Doc. S/2002/1043, September 19, 2002; cited in Van den Herik, L.J, op. cit, p 48; also in its 2002 report, the International Crisis Group accused the Government of Rwanda of directly blackmailing the ICTR by threat of suspending its cooperation or indirectly through survivors' organisations . there was finally the concern of the government about the ongoing investigations into the plane crash by the French investigating judge Jean-Louis Brugière; International Crisis Group, (1 Août 2002), *Tribunal Pénal International pour le Rwanda: le compte à rebours*, pp 10 – 15.

¹⁵⁴ Amnesty, op cit, p. 10.

authority is acknowledged without temporal or territorial limitations.¹⁵⁵ ICTR is therefore limited in all aspects of its competence, as will be seen below.

3.2 Competence of the ICTR

The competence of the ICTR is spelled out in article 1 of the Statute which is a general provision. The specific competence is found in articles 2, 3 and 4 (competence *ratione materiae*); articles 5 and 6 (competence *ratione personae* and *ratione loci*) and in article 7 (competence *ratione temporis*).¹⁵⁶ The ICTR was modelled on the ICTY as far as possible, and decisions on the jurisdiction only deviated when it was necessary because of different circumstances.¹⁵⁷ The ICTR has jurisdiction to try people for genocide and other crimes against humanity as well as serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II thereof. The armed conflict in and around Rwanda had elements of both an international and non-international - or internal - armed conflict.¹⁵⁸ This work attempts to demonstrate the dominance of the international character of the conflict over its internal aspects. Unlike the ICTY, the Tribunal was also given jurisdiction over acts that violate common Article 3 of the 1949 Geneva Conventions and Additional Protocol II to those conventions. These provisions apply to internal armed conflict.

The Tribunal has concurrent jurisdiction with national courts but enjoys primacy over them. This means that the Tribunal can request national authorities at any stage in the national proceedings not to try suspects they have in custody but to transfer them to the Tribunal for trial.¹⁵⁹ The country receiving such a request is obliged to transfer the person to the Tribunal. Most states, such as Belgium, Benin, Cameroon, Kenya, Switzerland, Zambia, South Africa, Denmark, United Kingdom, Senegal, Ivory Coast, United States, Tanzania, and others where

¹⁵⁵ Santos S., M., Jr, The International Criminal Court and rebel Groups, available at <http://www.icbl.org/wg/nsa/library/iccrblgr.html>, accessed on February 20, 2005.

¹⁵⁶ John R.W.D. J, (2000), *The practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 2nd edition, Transnational Publishers, Inc., Ardsley, NY, p 474.

¹⁵⁷ Van den Herik L. J., op cit, p 67.

¹⁵⁸ Ibidem

¹⁵⁹ Amnesty, op cit, p 10.

suspects or accused who were sought by the Tribunal and were arrested, have deferred to the competence of the Tribunal and these states transferred these persons to Arusha.¹⁶⁰

3.2.1 Competence *ratione materiae*

The Tribunal is competent to prosecute persons responsible for having committed one or more of the following three crimes: genocide (article 2, paragraph 2); crimes against humanity (article 3); and violations of article 3 common to the Geneva Conventions and of Additional Protocol II (article 4)¹⁶¹. These three categories of crimes constitute the material competence of the Tribunal. As stated earlier, this work deals only with the competence and jurisprudence of the ICTR under article 4 of its Statute.

Article 4 of the Statute lists a series of facts that are specifically punished if they meet other requirements provided for. However, those specific¹⁶² facts are not defined in IHL. This lacuna is very serious, as there is a need to reconcile the principle of humanity and at the same time respect the *odiosa sunt restringenda* criminal law principle. This principle requires that odious things be interpreted restrictively. To reach this step there must be widely and unanimously accepted definitions of the most serious crimes under IHL. This applies primarily in cases of gross violations where there have been many victims and many violators. Whereas it is desirable to restore public international order violated by individuals in a certain place in the world, it is equally true to consider the basic criminal law principles that apply in that area to avoid prosecuting innocent persons for the sake of IHL. Otherwise it

¹⁶⁰ Amnesty, op cit, p. 11.

¹⁶¹ Appendix II to the *Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and December 31 1994 covering the period from 1 July 1996 to 30 June 1997*, adopted on June 6, 1997, A/52/582, S/1997/868, November 13, 1997.

¹⁶² “Under the principle of specificity, criminal rules must be as specific and detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely, both the objective elements of the crime and the requisite *mens rea*. The principle is aimed at ensuring that all those who may fall under the prohibitions of the law know in advance which specific behaviour is allowed and which conduct is instead proscribed. They may thus foresee the consequences of their action and freely choose either to comply with, or instead breach legal standards of behaviour. Clearly, the more accurate and specific the criminal rule, the greater is the protection accorded to the agent from arbitrary action of either enforcement officials or courts of law”. Cassese A, *International Criminal Law*, Oxford University Press, 2003, at p 145; *Ntakirutimana*, (TC), para 860.

would be operating in what Cassesse calls legal indeterminacy and its consequent legal uncertainty¹⁶³.

IHL rather lists facts, which, in national jurisdictions, have a certain legal qualification. It is not required that these qualifications might be the same in all jurisdictions. To complicate the issue even further, the constitutive elements differ depending on each country. In the *Akayesu Case*, the Chamber noted, “For a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed¹⁶⁴”. This is because article 2(2)¹⁶⁵ of the ICTR Statute lists five offences. It would be ambiguous and very confusing to say that such accused violated article 2 of the ICTR Statute. One needs to specify which act a suspect is alleged to have committed which amounts to genocide. This reasoning should apply in regard to Article 4 of the Statute as well.

Article 4 is a combination of two distinct provisions, namely common Article 3 and Additional Protocol II. While the prosecution attempts to specify the facts basing its case under article 2 and 3 (genocide and crimes against humanity) of the Statute, it does not do the same with regard to article 4. The indictment will only say that X violated Common Article 3 of the Geneva Convention and Additional Protocol II. It is also worthy to note that the reading of common Article 3 is enough when some guidance is available to understand what a person is charged with. It is troublesome when one reads Additional Protocol II. The Statute of the ICTR does not specify which particular provision of Protocol II should have been violated.

¹⁶³ Cassesse, (2003), p 146.

¹⁶⁴ *Akayesu*, (TC) para 499.

¹⁶⁵ Article 2(2) of ICTR reads as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

3.2.1.1 Article 3 common to the Geneva Conventions, Additional Protocol II and Article 4 of ICTR Statute.

The question here is to facilitate the understanding of what an accused has to answer to in order to safeguard his rights and render justice. It also assists the defense when preparing its case in the pre-trial phase, in the course of the trial and other circumstances. The drafters of the Rome Statute of the International Criminal Court (ICC) addressed this concern as well¹⁶⁶. It is in fact a question of defining the terms used in Article 3 common to the Geneva Conventions as well as in Protocol II so as to avoid any misunderstanding or confusion when applying those terms. National criminal systems always define the key terms used in their criminal codes. It is true that sources of international criminal law vary. Accordingly those sources of international criminal law vary from State to State; and the way national courts apply this body of law may vary as well.¹⁶⁷ An efficient and fair trial would therefore require as a prerequisite the knowledge of the prevailing legal system by the parties and the judges.¹⁶⁸ The ultimate goal is to see justice done within a system in which neither the judges nor prosecutor nor defence are clear on how to proceed.¹⁶⁹

Article 4 of the Statute lists some facts subject of the jurisdiction of the ICTR. The list is not exhaustive. Other acts can be added even though up to now, this has not happened at the Tribunal. The question here is whether the ICTR has ever had cases that comprise all these facts. On the other hand, Article 3 Common to the four Geneva Conventions provides for a list of acts that shall remain prohibited at any time and in any place whatsoever. These facts are the following:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

¹⁶⁶ As corrected by the procès-verbaux of 10 November 1998 and 12 July 1999. Particularly article 9 1) provides that “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They should be adopted by a two-thirds majority of the members of the Assembly of States Parties.

¹⁶⁷ Cassesse, supra note 140

¹⁶⁸ TOCHILOVSKY V, “International Criminal Justice: Strangers in the foreign system”, in *Criminal Law Forum; an International Journal*, Volume 15, No. 3, 2004, pp. 319 – 344, at 320.

¹⁶⁹ Report on the state of Human rights in Bosnia and Herzegovina (Analysis for Period from January to December 2003), the Helsinki Committee for Human Rights in Bosnia and Herzegovina, <http://www.bh-hchr.org/statements/report.htm>, cited in TOCHILOVSKY, op. cit., p. 321

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

First of all, the article imposes a minimum standard of what is expected to apply. The last part of the article provides that “the Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”.

Following the same scheme and from a criminal prevention perspective, article 4 of Additional Protocol II provides:

the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever.

- (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishment;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Slavery and the slave trade in all their forms;
- (g) Pillage;
- (h) Threats to commit any of the foregoing acts.

The wording of article 4 a) of the ICTR Statute reproduces verbatim the provisions of Additional Protocol II in sub a) and lists what should be understood by the terms “violence to life, health and physical or mental well – being of persons”. The list shall be extended but the emphasis is particularly on two crimes that are murder and cruel treatments. The last crime so qualifies if it is a torture, mutilation or any form of corporal punishment. So when a defendant faces incrimination in this regard it must be proved what exact act he has committed. It must be proved whether he must answer to torture, mutilation or any form of corporal punishment. Yet this designation of corporal punishment must be specifically described, and the criteria for qualifying it, as a corporal punishment must be spelled out as well as how it was arrived at.

If it is an allegation of violence, it needs to be investigated whether such violence was exercised to the life (if for example the victim died); or to the health and physical or mental well – being of the person. In the last instances - suppose that the victim did not die - and we probably revert to the case of cruel treatments; such as torture, mutilation or any other substantial form of corporal punishment. It can be presumed that the corporal punishment should be substantial because it must be so serious to amount to an act of torture, which at the very least can be conducive to death.

The fundamental question is what the perpetrator actually did so as to qualify as a serious violation of humanitarian law (Common Article 3 or Additional Protocol II or both) if it ever applies. Putting it in other words, there must be an act that qualifies as a crime legally speaking. Is the act a murder, a rape or a torture?

Once this step is reached, it then becomes a question about the seriousness of the violation. How to appreciate that a violation was serious? This stage is quite interesting because it is not all the crimes listed under Article 4 of the Statute that the accused needs to answer to or to be criminally responsible for. In most cases, the ICTR seemed to make inferences pretending that the findings with regard to genocide or to crimes against humanity are equal with regard to serious violations of Common Article 3 and Additional Protocol II.

For example in the *Semanza Case*¹⁷⁰, the Chamber held that “torture under Article 4 has the same essential elements as those set out for torture as a crime against humanity”. Such analysis lacks thoroughness. Even if torture as a crime against humanity may have the same elements as torture (serious violation under article 4 of the Statute), it must be sorted out how serious is the violation to amount to a crime under article 4 and this is to be factually proved.

3.2.1.2 The most frequent offences charged as serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II

Criminal acts that took place in Rwanda during the war were primarily directed against persons. People were killed, mutilated, tortured or raped and so forth. Acts under article 4 a)

¹⁷⁰ *The Prosecutor v. Semanza*, Case No ICTR 97 – 20 – T, May 15, 2003, para 374.

and e) of the tribunal's Statute were committed as well as acts under Article 3 common to the Geneva Conventions, sub a) and b); Additional Protocol II, article 4 a) and e).

3.2.1.2.1 Murder

Sunga noted that since the definition of "murder" in domestic legal systems varies, it would be more fully spelled out in an international open code. The lack of such a definition in international law proves to be a more serious obstacle to general acceptance of this formulation.¹⁷¹ *Sunga's* view differs from the one expressed by the Trial Chamber in *Akayesu* Judgment. The Chamber stated that

The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act¹⁷².

Although the Chamber did not give out the purported definition of the ILC, it faced this issue again when it dealt with serious violations of Common Article 3 and Additional Protocol II. Once again, it didn't attempt to give any definition.

In further developments, the Chamber was of the view that:

Prior to developing the elements for the above-cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment upon the applicability of Common Article 3 and Additional Protocol II as regards the situation, which existed in Rwanda at the time of the events contained in the indictment¹⁷³.

This clearly indicates that the Chamber wished to further explain the constitutive elements of the crimes listed under article 4 of the Statute, which it never did. It only referred to the finding of the ILC without citing this finding. This complicates the matter. The main problem with the ICTR judgments is the tendency to concentrate more on the applicability of a provision without setting up the different elements of a given offence in a particular case. This goes against the interest of the accused when he can be found guilty of an offence that he did not commit at all. The Prosecutor will argue that given the large scale of massacres in

¹⁷¹ *Sunga* L S, *The Emergency of International Criminal Law, Development in Codification and Implementation*, Kluwer Law International, The Hague, London, Boston, 1997, p 129.

¹⁷² *Akayesu*, (TC), para 587.

¹⁷³ *Akayesu*, (TC), para 600.

Rwanda, it can be inferred that the crimes charged were actually committed and that probably the individual was involved somehow, which sometimes, was not the case.

The ICTY adopted a different strategy in this regard in the *Blaskic case*¹⁷⁴. On its way to finding the elements of grave breaches of IHL, it noted that:

once it has been established that Article 2 of the Statute is applicable in general, it becomes necessary to prove the ingredients of the various crimes alleged. The indictment contains six counts of grave breaches of the Geneva Conventions, which refer to five subheadings of article 2 of the Statute¹⁷⁵.

This Chamber then went on to define the different elements of offences listed under article 2 of the Statute¹⁷⁶. This is an exercise that any international court should do in assessing any single case in its particularity.

A leading case in which the ICTR attempted to define the elements of crimes charged specifically for the application of Article 4 of the Statute is the *Cyangugu case*¹⁷⁷. In this case, the Trial Chamber gave its understanding of murder, torture, and cruel treatment¹⁷⁸. However, the Chamber did not explain how the different elements of those crimes applied to the facts.

In the *Akayesu Case*, the Chamber defined murder as crime against humanity, as the unlawful, intentional killing of a human being. The requisite elements of murder are:

1. The victim is dead;
2. The death resulted from an unlawful act or omission of the Accused or a subordinate;
3. at the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not¹⁷⁹.

¹⁷⁴ *The Prosecutor v. Tihomir Blaskic*, Case No IT – 95 – 14 – T, March 3, 2000.

¹⁷⁵ *Blaskic*, (TC), para 151.

¹⁷⁶ *Blaskic*,(TC), para 154 – 158.

¹⁷⁷ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No ICTR – 99 – 46 – T, 25 February 2004. Referred to as *Cyangugu case*, (TC)

¹⁷⁸ *Cyangugu Case*, (TC), para 794 through 802.

¹⁷⁹ *Akayesu*, (TC), para. 589; *Musema*, para 215 (a,b,c only); *Rutaganda*, para 80; the ICTY recently summarised the elements of murder that it considered as unanimous to both the ICTY and the ICTR, it held that “in the jurisprudence of both the Tribunal and the ICTR, murder has consistently been defined as the death of the victim which results from an act or omission by the Accused, committed with the intent either to kill or to

Murder was also defined in the *Kayishema and Ruzindana* case.¹⁸⁰ The Accused is guilty of murder if he, engaging in conducts which are unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. Intending to kill any person or,
4. Intending to cause grievous bodily harm to any person.

These elements of murder do not give room to inferences or presumptions. But in the *Cyangugu* case the Chamber concluded that a person died because a witness could not see him again. The passage reads as follows:

The Chamber also accepts Witness LI's testimony that his brother and his classmate with whom he was arrested and incarcerated at the camp are dead, which the witness would reasonably know because of his relationship with them¹⁸¹.

This witness did not say that he saw the dead body of the person he alleged was killed, but the Chamber drew a conclusion that the persons died because the witness knew some of his friends, that they were incarcerated with him (in the meantime he fled) and he was related to them. The Chamber did not assess the first element correctly¹⁸². Failure to assess the crucial element that the person actually died, bars all other ways to assess other elements. They in fact become baseless; the foundation being the death of the person. Murder is the most common crime charged under article 4 of the Statute of the ICTR.

cause serious bodily harm with the reasonable knowledge that it would likely lead to death." *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, IT – 02 – 60 – T, January 17, 2005, para 556.

¹⁸⁰ *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No ICTR 95 – 1 – T, May 21, 1999, para 140; see *Bagilishema*, (TC), para 84 - 85.

¹⁸¹ *Cyangugu* case, (TC), para 392

¹⁸² See also same reasoning at par 395 and 396, the Chamber concluded that "Some of the prisoners who had been removed for questioning did not return while others did, indicating that they had been questioned. At one point, soldiers called out the names of one of the witness's sisters and her cellmate Mbembe and removed them from their cell. Since then, the witness's sister has not been found, while Mbembe's dead body was found later. During the witness's incarceration, Imanishimwe came to ask the witness's father if he knew a certain trader and an MRND official, whom his father did know. A few days later, Second Lieutenant Hakizimana called out the names of the witness and the other family members detained with him and drove them home. Woman, Mbembe, who was subsequently found dead. The Chamber finds that she was killed between 7 June 1994 and 11 or 12 June 1994, considering the date of the Kamembe city search, the date on which Witness MG and his family were transferred to the camp, and the period of time they were incarcerated at the military camp there. 396. The Chamber accepts Witness MG's assertion that his sister was killed, given the time that has passed since she was removed from her cell, the fact that if she had been alive at the camp, she would have been released with the other family members, and the circumstances of being taken from her cell by soldiers at night with another.

3.2.1.2.2 Torture

Most of the defendants before ICTR are charged with the crime of torture as a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II. However, relatively few attempts have been made to define the offence of torture. The available definitions are in Article 1 of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration on Torture”)¹⁸³, Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”)¹⁸⁴ and Article 2 of the Inter-American Convention to Prevent and Punish Torture of 9 December 1985 (“Inter-American Torture Convention”)¹⁸⁵. In *Furundzija*¹⁸⁶ case, the Trial Chamber of the ICTY pointed out that it should identify or spell out some specific elements that pertain to torture considered from the specific viewpoint of international criminal law relating to armed conflicts. In fact the definition of an offence is largely a function of the environment in which it develops.¹⁸⁷

Before the ICTR, torture is treated as a crime against humanity and at this stage abundant literature exists to define this crime. However and pursuant to the view of the Trial Chamber in *Furundzija*, it is necessary to approach the offence of torture as it pertains to the armed conflict when it is charged under article 4 of the ICTR Statute.

In the *Semanza* case, Trial Chamber III of the ICTR defined torture as a crime against humanity. It stated that

¹⁸³ Adopted by UN General Assembly resolution 3452 of December 9, 1975.

¹⁸⁴ In the “Torture Convention”, “torture” is defined as “ any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. É does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

¹⁸⁵ The Convention was signed on 9 Dec 1985 and entered into force on February 28, 1987. See OAS Treaty Series No 67, OEA/Ser.A/42 (SEPF).

¹⁸⁶ *Prosecutor v Furundzija*, Case IT-95-17/1-T, December 10, 1998, par 159, cited in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No.: IT-96-23-T & IT-96-23/1-T, February 22, 2001, para 468.

¹⁸⁷ *Furundzija*, (TC), para 469.

torture is the intentional infliction of severe physical or mental pain or suffering for prohibited purposes including: obtaining information or a confession; punishing, intimidating or coercing the victim or a third person; or discriminating against the victim or a third person. There is no requirement that the conduct be perpetrated solely for one of the prohibited aims¹⁸⁸.

Attempting in the same case to define torture as a violation of Common Article 3 and Additional Protocol II, the Chamber only referred to its definition under crimes against humanity; “torture under article 4 has the same essential elements as those set forth for torture as a crime against humanity¹⁸⁹”.

The legal findings read as follows:

Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture. It is therefore unnecessary to determine whether this rape also inflicted *severe physical* pain or suffering, for which the Prosecutor only adduced evidence of the fact that non-consensual intercourse occurred.¹⁹⁰

This view is simplistic because it does not define “torture” in the context of an armed conflict which is the main condition of applicability. In defining an offence under IHL, the Trial Chamber must be mindful of the specificity of this body of law. In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber should consider two crucial structural differences between these two bodies of law.

In the event that the State violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements. In the field of IHL, and in particular in the context of international prosecutions, it is not advisable to quickly and easily adopt a definition arrived at in another legal context.

¹⁸⁸ *Semanza*, TC, para 343.

¹⁸⁹ *Semanza*, TC, para 374.

¹⁹⁰ *Semanza*, (TC), para 482.

In *Semanza* case, however, the ICTR Trial Chamber did not specify what exact actions the accused actually performed that inflicted severe mental or physical suffering to the victim or what the aim and purpose of those severe sufferings were. It is not sufficient to say “the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A”. Here the Chamber is emotionally imagining what the situation was but it is not discovering what really happened. The Chamber would have found that the victim sustained severe mental suffering, or that it was physical suffering, whichever applied. Reasonably it would look like a medical assessment of the state of a victim who claims to have sustained severe mental or physical sufferings.

The same Chamber in another case¹⁹¹ went a bit deeper in its inquiry and found that soldiers severally beat Witness MG and another detainee and hammered a long nail into the foot of one detainee, removed the nail, and hammered it into the foot of another detainee while questioning them whether they were members of the RPF and accusing them of collaborating with the enemy. As a result of this mistreatment, Witness MG could not stand up for several days, and the two detainees who had been mistreated with the nail screamed in pain in their cell.

At least here some facts appear and may constitute “torture” in the meaning of the Torture Convention. The objective elements of torture that need a factual assessment are therefore (i) ‘any act by which severe pain or suffering, whether physical or mental, is inflicted on a person’; (ii) ‘such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’; and (iii) such pain or suffering does not arise ‘only from’ nor is it inherent in or incidental to lawful sanctions’¹⁹². There are few instances where the accused persons were charged with violation of article 4 (e) of the Statute. In the view of the Chambers, the different offences are to be regarded as lesser forms of torture¹⁹³ Additional Protocol II.

¹⁹¹ *Cyangugu Case*, (TC), para 796.

¹⁹² Cassesse, op. cit., pp 119 – 120.

¹⁹³ In the *Musema Case*, the Chamber remarked, deciding on humiliating and degrading treatment “subjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as lesser forms of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority”, *Musema*, (TC), para 285; see also *Bagilishema*, (TC), para 102.

3.2.2 Competence *ratione temporis*.

Article 7 of the statute limits the temporal jurisdiction of the Tribunal. The commencement date was fixed to January 1, 1994 and the closing date is December 31, 1994. It is argued that the choice of January 1, 1994 was arbitrary and seems more to be a compromise than vesting any political or symbolic connotation.¹⁹⁴ The ending date was arbitrary as well because massacres had not stopped by then. It however intended to include within the jurisdiction of the Tribunal serious violations of IHL which reportedly, continued after the Tutsi Government seized power in July 1994.¹⁹⁵ It is worthy to note that the newly established government of Rwanda wanted October 1, 1990 to be the starting date to ensure that all the subsequent massacres of 1991, 1992 and 1993 were covered. This wish is translated in the ensuing legislation¹⁹⁶ aimed at prosecuting genocide and crimes against humanity as well as serious violations of IHL committed from the October 1, 1990. As regards the final date, Rwanda proposed that the time limit should be July 17, 1994, when the RPF defeated the governmental forces and ended the war. This proposal by Rwanda is rather arbitrary, since it excludes any possible crime committed by members of the new Rwandan government after they came to power.¹⁹⁷ It also conflicts with the final report of the Commission of Experts, in which the Commission in particular, recommended investigating crimes committed by the RPF, also in the light of the violence continuing after July 1994.¹⁹⁸

¹⁹⁴ The International Criminal Tribunal for Rwanda: The Jurisdiction of the International Tribunal, available at <http://www.ejil.org/journal/Vol7/No4/art3-03.html>, accessed on 18/02/2005.

¹⁹⁵ *Ibidem*.

¹⁹⁶ See for instance *Organic law n°08/96 of 30th August 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since October 1, 1990; Organic law n° 33/2001 of 22/6/2001 modifying and completing organic law n° 40/2000 of January 26, 2001 setting up "gacaca jurisdictions" and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994; Organic law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994; Organic law n° 40/2000 of 26/01/2001 setting up « gacaca jurisdictions » and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994.*

¹⁹⁷ Van den Herik, L. J., *op. cit.*, p 84.

¹⁹⁸ UN Doc. S/1994/1405, December 1994, para 186.

Views¹⁹⁹ differ as to whether the Tribunal has temporal competence outside of the one provided for in the Statute. In most cases, the Trial Chamber expressed its readiness not to overlap its defined competence on substantial issues that are to make guilty or innocence findings on specific crimes committed before 1994. In *Ferdinand Nahimana* case²⁰⁰ the Chamber stressed that it was fully aware of the temporal limits placed upon it by the Statute. However it considered that information which falls outside of the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994²⁰¹ as well as providing a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994.²⁰²

Furthermore, the Chamber was also of the opinion that the proper time to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to January 1, 1994, was during the assessment of evidence. Accordingly, these were matters that the Chamber would consider at the trial of the accused. Whereas this position was taken pursuant to a motion challenging the contents of an indictment, it impacted on the assessment of the merit. In its judgment, the Trial Chamber divided this issue into two components: the material elements that constitute evidence of the intent of the accused or a pattern of conduct by the accused in addition to the offence of conspiracy.

¹⁹⁹ Different views on the competence before 1994 were expressed in some decisions of the ICTR like the following: *Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, *Decision on the Defense Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment*, April 13, 2000, para. 27-33; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, *Decision on the Defense Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence*, July 12, 2000; *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case No. 96-34-I, *Decision on the Defense Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio*, April 13, 2000, para 38-44; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, *Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion based on Defects in the Form of the Indictment and lack of jurisdiction*, November 20, 2000, para 38.

²⁰⁰ In the *Nahimana* decision of July 12, 2000, the defense, in a preliminary motion, raised the issue that, of the fifty-nine paragraphs of allegations in the indictment, twenty-eight allege events that fall outside the temporal jurisdiction of the Tribunal. According to the defense, these allegations form the constitutive elements of the crimes and, therefore, should be deleted from the indictment.

²⁰¹ *Ibidem*.

²⁰² *Decision on the Prosecutor's Request for Leave to Amend the Indictment*, in *Prosecutor v. Hassan Ngeze*, Case No ICTR – 97 – 27 – I, 5 November 1999, para 3.

With regard to pre-1994 material²⁰³ which constitutes evidence for the intent of the accused or a pattern of conduct, the Chamber held:

To the extent that such material was re-circulated by the accused in 1994, or the accused took any action in 1994 to facilitate its distribution or to bring public attention to it, the Chamber considers that such material would then fall within the temporal jurisdiction established by its Statute.²⁰⁴

Referring to a dissenting opinion of an Appeal Chamber judge²⁰⁵, where the judge was of the opinion that all crimes charged were to be treated on equal footing no matter whether they were considered as continuous or so-called inchoate crimes, the Trial Chamber held:

The adoption of 1 January 1994 rather than 6 April 1994 as the commencement of the Tribunal's temporal jurisdiction, expressly for the purpose of including the planning stage, indicates an intention that is more compatible with the inclusion of inchoate offences that culminate in the commission of acts in 1994 than it is with their exclusion. It is only the commission of acts completed prior to 1994 that is clearly excluded. The Chamber adopts the view expressed by Judge Shahabuddeen with regard to the continuing nature of a conspiracy. The Chamber considers this concept applicable to the crime of incitement as well, which, similarly, continues to the time of the commission of the acts incited.²⁰⁶

The Trial Chamber was, however, cognisant of the fact that the SC debate on the temporal jurisdiction of the ICTR did not provide guidance on the application of temporal jurisdiction to these particular offences, which, unlike the other crimes set forth in the Statute, occurred both in and prior to 1994. This extrapolation overlooked effectively those SC debates and the wish of the Government of Rwanda to provide October 1, 1990 as the commencement date in the expressed intent of limiting the jurisdiction to only the year 1994. In a decision in the *Military I* case, the Trial Chamber emphasised and elaborated on the opinion of Judge

²⁰³ The materials concerned are some broadcast, publications and other dissemination of media by the Accused prior to 1994.

²⁰⁴ *Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze*, Case No ICTR – 99 – 52 – T, December 3, 2003, para 103.

²⁰⁵ Joint Separate opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia. The challenged decision was that of September 5, 2000 (Decision sur les Appels Interlocutoires, in *Hassan Ngeze (Appelant), Affaire No ICTR – 97 – 27 – AR72 and Ferdinand Nahimana (Appelant) c. Le Procureur, Affaire No ICTR – 96 – 11 – AR72*, 5 septembre 2000. Both appellants wanted that paragraphs of the indictments containing events prior to 1994 be fully quashed from the indictment. The Trial Chamber has dismissed their case and they appealed the decision.

²⁰⁶ *Media case*, para 104

Shahabuddeen²⁰⁷. The trial Chamber listed three situations in which evidence of pre-1994 events could be relevant, viz. (i) when it concerned evidence of a continuing offence that had started before 1994 and continued into 1994; (ii) when it concerned crucial background information; and (iii) when it concerned “similar fact evidence”. In this last situation, it was indicated that such evidence could only be used in exceptional cases²⁰⁸, for instance to prove systematic conduct on the part of the accused.

The offences that are at stake with regard to serious violations of IHL do not fall in the category discussed above for which temporal jurisdiction may go beyond 1994. All the crimes charged as serious violations of IHL do not allow such an interpretation as all of them are completed offences, and not continuous.

It is also very difficult to know which period is being considered by the ICTR to establish certain facts as far as the armed conflict is concerned. Whereas when assessing other situations the Chamber would state the timeframe within which its temporal jurisdiction runs and probably why it may overlap.²⁰⁹ In regarding the armed conflict, there is no clear decision of the ICTR. The question is therefore to know from what point in time do the chambers take judicial notice that there was a conflict of a non-international character in Rwanda. Was it from January 1, 1994 up to December 31, 1994 so as to cover its statutory temporal jurisdiction? Was it rather from April 7, 1994 when the hostilities resumed, or is there any other timeframe?

The various Trial Chambers are not unanimous as to the period during which they purport to characterise the conflict as being non-international in character, thereby taking judicial notice of that particular fact of “common knowledge”. For example in *Semanza* and *Cyangugu* cases, Trial Chamber III stated that:” The Chamber takes judicial notice of the following fact of common knowledge that: "Between 1st January 1994 and 17th July 1994, in Rwanda,

²⁰⁷ *Ngeze and Nahimana v. The Prosecutor, Appeal Decision, Separate Opinion of Judge Shahabuddeen*, September 5, 2000, para 20.

²⁰⁸ Pursuant to common law jurisdictions from which this concept originated, similar fact evidence is prejudicial and therefore inadmissible if used solely to denote the bad character of the accused, *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva*, Decision, September 18, 2003, para 11 – 13.

²⁰⁹ Consider for example *The prosecutor v. Ferdinand Nahimana*, ICTR – 96 – 11 – T, *Decision on the Defense Preliminary motion pursuant to rule 72 of the rules of procedure and evidence*, July 12, 2000.

there was an armed conflict not of international character"²¹⁰ while in *Kayishema and Ruzindana*, there is no suggestion of dates but only months. The Trial Chamber found that that was not a question that needs to be addressed. In its view, it had been established, beyond a reasonable doubt, that there was an armed conflict, not of an international character, in Rwanda. This armed conflict took place between the FAR and the dissident armed forces, the RPF, during the time of the events alleged in the indictment, i.e., from April to July 1994.²¹¹ In *Kajelijeli* case there was a softening of position but which is distinguishing somehow from the preceding: the Trial Chamber held, taking a judicial notice, that: "Between 1 January 1994 and 17 July 1994, Rwanda was a Contracting Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977 – having acceded to Protocols Additional thereto of 8 June 1977 on 19 November 1984".²¹² This might suggest that these provisions were applicable and probably that their conditions of applicability were fulfilled as well. Although the idea that is advanced is "common knowledge", that common knowledge ought to have the same starting point and same closing point in time as to be judicially noticed.

3.2.3 Competence *ratione personae*.

The mandate of the Tribunal covers certain crimes committed by anyone during 1994 in Rwanda, and by Rwandese citizens in neighbouring countries, including members of both the former government's security forces and militia and of the RPF. Indeed, the Tribunal is obliged to investigate and prosecute abuses by the RPF as well as the former government. The former UN Special Rapporteur, René *Degni-Ségui*, indicated in his reports to the UN Commission on Human Rights that the RPF committed serious human rights abuses, a conclusion he repeated during his testimony at the trial of Clément *Kayishema* and Obed *Ruzindana*. For the moment, it appears that the Office of the Trial Prosecutor (OTP) is concentrating exclusively on crimes committed by the former government of Rwanda and its associates. While the Tribunal will complete its Trial work by 2008 and appeals by 2010, there are yet no indictments arising out of the alleged crimes committed by the RPF and none apparently imminent. Even though many reports of crimes committed by the RPF in 1994

²¹⁰ *Cyangugu* case, Oral decision, July 4, 2002.

²¹¹ *Kayishema and Ruzindana*, (TC), para 597.

²¹² *Prosecutor v. Juvénal Kajelijeli*, Case No ICTR – 98 – 44A – T, December 1, 2003, para 744.

have been made available to the OTP, whether in confidential submissions by individuals, in public documentation by non-governmental organisations and others, and in testimony provided by some of its own expert witnesses, nothing is being done to prosecute RPF abuses during the period covered by the mandate.

Given the scale of the genocide, it may seem appropriate for the OTP to accord a high priority to investigating crimes committed by the former government of Rwanda and its associates. Victims of the genocide and other crimes against humanity demand justice, as soon as possible. Nevertheless justice must be impartial; it must be done and seen to be done for all, regardless of who the victims or perpetrators are.²¹³ Even though in this section the work focuses on the personal competence of the ICTR, it is convenient to group the individual perpetrators into their main categories that are the former Government of Rwanda and its components as well as the RPF and its sympathisers and supporters. This procedure should not be understood as if the work treats juridical persons rather than natural persons.

In his report pursuant to paragraph 2 of S C resolution 808(1993) establishing the ICTY, the Secretary General believed that natural persons only should be held responsible²¹⁴ of violations of IHL. This is supported by Article 5 of the ICTR Statute, which provides that “the International Tribunal shall have jurisdiction over natural persons pursuant to the provision of the present Statute”. This provision is the same as Article 6 of the ICTY Statute. This work is not questioning the international status of an individual as a subject of international law. Nevertheless it should be stressed that the ICTY as well as the ICTR made significant contributions in reaffirming the duties of individuals under international law.²¹⁵

²¹³ Amnesty, *op. cit.*, p 16.

²¹⁴ Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808(1993), including the Statute of the Tribunal, as Appendix B, in Clark R. S. and Sann M., *op. cit.*, p. 400.

²¹⁵ Van den Herik, L. J. , *op. cit.*, p 72

3.2.3.1 Personal competence with regard to the former Rwandan Government Side.

Violations committed by the government side²¹⁶ are very well documented and inferences have been drawn towards their legal qualification to finally classify them as genocide (article 2 of the ICTR Statute), crimes against humanity (article 3) or serious violations of Article 3 Common to the Geneva Convention and Additional Protocol II (article 4). Depending on the legal interest protected and the material elements required for any crime charged, some facts have multiple qualifications, i.e. a same act can be qualified as genocide and as a crime against humanity or as a violation of common article 3 and Additional Protocol II. However, the issue of qualification arises during trial and it will not be discussed here. The concern is more directed to the facts which, in the opinion of human rights investigators or the experts, were regarded as violations of IHL regardless of whether they should so qualify in a court of law. The approach will then refer to reports²¹⁷ that were drawn up following investigations. Once again the intention is to strictly remain within the scope of article 4 of the Statute of the ICTR as it reads in Resolution 955(1994).

According to the Final Report of the commission of experts established pursuant to resolution 935(1994)²¹⁸, the extermination of Tutsis by Hutus was carried out by Hutu elements in a concerted, planned, systematic and methodical way and was motivated out of ethnic hatred. It would be simplistic to fully agree with this statement as it is up to the tribunal to look at each element alleged, and to decide one way or another, on a case-to-case

²¹⁶ “Virtually all the killers belonged to the majority Hutu ethnic group... Most of the killers are supporters of the former ruling party MRND, particularly its youth wing known locally as *Interahamwe*. Others belong to its allied CDR party, and its youth wing known locally as *impuzamugambi*”, Amnesty International: *Rwanda, Mass murder by government supporters and troops in April and May 1994*, May 1994, AI Index: AFR 47/11/94, p 1.

²¹⁷ In the *Akayesu* Judgment, the Trial Chamber took judicial notice of some reports which extensively document the massacres which took place in Rwanda in 1994: notably, the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994); *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Wally Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993); *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda*, S/1994/470, 20 April 1994; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994*, U.N. Doc. E/CN.4/S-3/3 (1994). See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996*, The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York, *Akayesu*, (TC), para 165.

²¹⁸ *Final Report of the commission of experts established pursuant to resolution 935(1994)*, para 56.

basis. But from a personal point of view, a first finding appears that elements of the Hutu ethnic group were involved in gross human rights violations.²¹⁹ The report further alleges that, elements of the armed forces and militia committed violations. Once again it is not wise to make comments at this stage, leaving the issue to be determined by the ICTR through cases before it. Although the findings of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990,²²⁰ fall out of the temporal jurisdiction of the ICTR, those findings are, however, an indication of the type of persons who were involved on the Government side.

After gathering hundreds of testimonies and excavating mass graves, the commission concluded that:

the Rwandan government killed an estimated 2,000 of its own citizens since war began in October 1990. Most of the victims were Tutsi, but the number of Hutu killed, almost all members of opposition parties, has risen sharply in recent months. In addition, attacks organised by the government have wounded thousands of people and deprived even more of their homes, domestic animals and other goods. According both to attackers and to victims, authorities at all levels of local administration are, to varying degrees, responsible for the attacks. As shown below, some local authorities did not participate. In regions near military camps, soldiers led or assisted civilians in the attacks. During the months before and after the attacks, soldiers summarily executed victims targeted by the civilian authorities in the camps.²²¹

²¹⁹ Same fact findings are included in the Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), annexed to Letter Dated October 1, 1994 From the Secretary-General Addressed to the President of the Security Council, S/1994/1125, October 4, 1994. It is worthy to note that the Commission was appointed on July 26, 1994 and composed of three members acting in their personal capacity, being Mr. Atsu- Koffi Amega (Togo), as chairman, Ms Maby Dieng (Guinea) and Mr. Salifou Fomba (Mali); Report of the Secretary – General on the Situation in Rwanda, S/1994/640, 31 May 1994, paragraphs 6 and 7, Alison Desforges, Genocide in Rwanda April – May 1994” vol.6 No 4 dated May 1994, Human Rights Watch/Africa“; Report on the Situation of Human rights in Rwanda submitted by Mr. R. Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S –3/1 of 25 May 1994, E/CN.4/1995/7, June 28, 1994; Report on the Situation of Human rights in Rwanda submitted by Mr. R. Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution S-3/1 of 25 May 1994, E/CN.4/1995/71, January 17, 1995, para 13 - 20.

²²⁰ *Final Report of the International Commission of Investigations on Human Rights Violations in Rwanda since October 1, 1990, (January 7 – 21, 1993),* March 1993, p 11; *Report by Mr. B.W. Ndiaye, Special Rapporteur on Extrajudicial, summary or arbitrary execution, on his mission to Rwanda from 8 to 17 April 1993, E/CN.4/1994/7/Add.1,* 11 August 1993, para 28.

²²¹ *Final Report of the International Commission of Investigations on Human Rights Violations in Rwanda since October 1, 1990, (January 7 – 21, 1993),* p 11.

Another element that clearly emerges is the implication of soldiers in the gross human rights violations as well as authorities at various levels of administration. Furthermore, there is an active participation of common civilians in the attacks directed against other civilians. Most of the indictments against the accused before the ICTR and fact findings emphasise the active role of militias, namely *Interahamwe* and *Impuzamugambi*. *Interahamwe* was a youth wing of the MRND party in and before 1994. *Impuzamugambi* was the youth wing of the CDR party. The existence of the youth wings of political parties was in no way illegal or abnormal. What made them abnormal is their alleged role in the massacres as well as the label that ensued and which moved to be the conclusion of judges.²²² Once again there is no attempt to introduce collective criminality. This point is made solely to spell out the groups to which some defendants belonged. Sections 281 and 283 of the Rwandan Criminal Code punish criminal enterprises. It should be pointed out that the enterprise existed for the sole purpose of committing the crime with which everyone belonging to the group is charged. Charged persons are co-authors of others pursuant to sections 89, 90 and 91 of the Rwanda Criminal Code. ICTR Prosecutor makes recourse to joinders in an attempt to prove conspiracy by grouping people by region or theme.²²³

²²² In the facts finding of Trial Chamber II assessing the credibility of expert witness Dr. *Bangamwabo* in the *Kajelijeli* case, the Chamber concluded that “ on the basis of the testimony of Dr. *Bangamwabo* and the totality of the evidence brought before it that *Interahamwe* was, in 1994, the name used to identify the youth-wing of the MRND and that during and after the events of April – July 1994 it became also a synonym for genocidaire, used by the general populace”, in fact meaning the killers, *Kajelijeli*, (TC), par 82; see also *Akayesu* (TC), par 151 “The term *Interahamwe* derives from two words put together to make a noun, *intera* and *hamwe*. *Intera* comes from the verb *gutera* which can mean both to attack and to work. It was documented that in 1994, besides meaning to work or to attack, the word *gutera* could also mean to kill. *Hamwe* means together. Therefore *Interahamwe* could mean to attack or to work together, and, depending on the context, to kill together. The *Interahamwe* were the youth movement of the MRND. During the war, the term also covered anyone who had anti-Tutsi tendencies, irrespective of their political background, and who collaborated with the MRND youth.”

²²³ There are *Butare case* that comprises 6 natives of the *Butare* region, namely Pauline *Nyiramasuhuko* (former Minister of Family and Women Affairs), her son *Ntahobari* (former leader of *Interahamwe* youth wing), *Kanyabashi* (former mayor), *Nteziryayo* (retired army officer and prefect of *Butare*), *Ndayambaje* (former mayor), *Nsabimana* (former prefect); *Military I case* that includes colonel *Bagosora* (former director of the defense Minister cabinet), colonel *Nsengiyumva* (former operations commander of Gisenyi region), brigadier – general *Kabiligi* (former head of military operations at the Army Headquarters), major *Ntabakuze* (former commander of the Para commandos battalion); *Military II case*, which is a joinder of major-general *Bizimungu* (former Chief of Staff of the Army), major-general *Ndindiliyimana* (former Chief of Staff of Gendarmerie Nationale), major *Nzuwonemeye* (former commander of the Reconnaissance battalion) and captain *Sagahutu* (former second-in-command of the Reconnaissance battalion); *Government I case* comprising four former ministers, namely *Karemura* (Interior), *Ngirumpatse* (former MRND chairman) and *Nzirorera* (former MRND Secretary and spokesperson of Parliament); *Government II case* including *Bizimungu* (former minister of Health), *Mugenzi* (former minister of commerce), *Mugiraneza* (former minister of Civil Service), *Bicamumpaka* (former minister of foreign affairs); *Media case* including *Nahimana* (a former university lecturer), *Ngeze*

3.2.3.2 The personal competence for violations committed by the RPF

There is no doubt that the RPF was involved in gross violations of IHL during the period under consideration and even afterwards.²²⁴ The problem is an apparent unwillingness to properly investigate those violations and where attempts have been made they only seemed as show-off of the purported independence of some commissioners or experts.²²⁵ Lawmakers are, first of all, policy makers, as noted idiomatically by David P. Forsythe²²⁶ that

Those who would draw a clear distinction between law and politics are to be found in ivory towers than in corridors of power. If politics refers to the struggle to exercise power in the making of policy, and if law refers to formalized policy, then it can easily be seen that law and politics substantially overlap.

This idiom is exemplified by the following events regarding the biased manner in which the violations attributed to RPF were investigated. Most of the findings lack sufficiency because of purported time constraints or unavailability of information or simply unwillingness that such information be known. The question is then to know why the information is unavailable when it comes to RPF side. This section refers to the same reports in an attempt to better clarify the substance of information contained therein as to allow an appropriate conclusion. Starting with the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990; it remarked that “Human Rights have suffered seriously in

(founder and owner of a newspaper) and *Barayagwiza* (former political director of the ministry of foreign affairs); *Cyangugu* case that comprised *Ntagerura* (former minister of transport and communication); *Bagambiki* (former prefect of *Cyangugu*) and *Imanishimwe* (former commander of *Cyangugu* Military barracks)

²²⁴ Alison Des Forges, *Leave None to Tell the Story Genocide in Rwanda*, Human Rights Watch, New York. Washington. London. Brussels, 1999; International Federation of Human Rights, Paris, pp 692 – 735; also available at <http://www.hrw.org/reports/1999/rwanda>. See also The RPF and Human Rights, *International Panel of Eminent Personalities (2000) Rwanda: The Preventable Genocide* U/IPEP/PANEL, para 22.1 - 22.42; also available on line at <http://www.oau-oua.org/Document/ipep/rwanda-e/EN.html>., accessed January 15, 2005.

²²⁵ According to Rwandan human rights organisations, RPF soldiers killed hundreds of civilians in the town and prefecture of Ruhengeri during the offensive of February 1993. In some cases, the soldiers reportedly asked the victims to produce their political party membership cards and then killed those who belonged to the MRND or CDR. The RPF was widely Accused of killing civilians in two incidents in November 1993. Investigators from UNAMIR examined the cases, but never issued a public report.

²²⁶ Forsythe D P., “Politics and the International Tribunal for the Former Yugoslavia”, in *The Prosecution of International crimes*, edited by Clark R. S and Sann M, Transaction Publishers, New Brunswick and London, 1996, p 185.

Rwanda since the beginning of war there on October 1, 1990.²²⁷ The Commission concluded that both the Government of Rwanda and the RPF had been guilty of human rights abuses. The commission further emphasised that the RPF had attacked civilian targets and injured civilians who were clearly protected by the Geneva Conventions. It kidnapped and expelled civilians to Uganda and looted or destroyed civilian property.²²⁸

The Rapporteur on extrajudicial, summary or arbitrary execution, Mr. *Bacre Wally Ndiaye*, also arrived at the same conclusion. He noted that a number of violations of the right to life attributable to forces of the Rwandan Patriotic Front had been brought to his attention.²²⁹ It is also alleged that the RPF used to assemble people in camps and then shell them indiscriminately. The RPF explained that the purpose of these camps was to screen the population for members of *Interahamwe* and others suspected of the killings. According to some sources, such individuals, when identified, were executed. RPF denied the charge declaring that, while such incident might have occurred in the early stage of the conflict, such persons were subsequently being held for investigations and trial. It did, however, acknowledge that RPF personnel have killed armed persons in civilian clothing.²³⁰ The explanations provided are, as everyone could expect, official ones because the reality says otherwise.

An RPF dissident, Captain *Josué Ruzibiza*,²³¹ revealed that this is more than true. In fact it was an RPF practice to assemble persons in a location and fire at them, and to collectively rape girls and women, especially in locations close to the Ugandan border. In provinces like Ruhengeri, people were requested to carry RPF wounded soldiers and deceased. They were

²²⁷ *Final Report of the International Commission of Investigations*, p 3.

²²⁸ RICR/IRRC, (septembre/September 2002, Vol. 84 No 847), p 4.

²²⁹ *Report by the Special Rapporteur on extrajudicial, summary or arbitrary execution on his mission to Rwanda, Mr. Bacre Wally Ndiaye 8 – 17 April 1993, E/CN.4/1994/7/add.1*, August 11, 1993, p 43

²³⁰ *Report of the Secretary – General on the situation in Rwanda, S/1994/640*, May 31, 1994; para 7.

²³¹ Captain *Josué Ruzibiza* in unedited statement (Abdul Josué Ruzibiza, *Rwanda: Testimony of Abdul Ruzibiza*, Norge, April 14, 2004 (free translation)) gave a detailed account of atrocities committed by the RPF as someone who belonged to that force and was very much involved in the massacre, and later fled the country on February 4, 2001. He was bitterly attacked by the Rwandan government who qualified him as a pure liar. He then decided to disclose his identity as well as providing his photo. He gave his military incorporation number as OP 1920 holding the rank of Lieutenant, and that on March 14, 2004 he was residing at 4647 Breinnsen, in Norway, unfortunately his testimony is not published but it is corroborated by testimonies from other defectors from the RPF like second lieutenant Aloys Ruyenzi, OP 1460 who also fled Rwanda. He alleged to be a former bodyguard and intelligence officer of Major General Kagame, the current President of Rwanda.

forced to also look after cattle stolen from them as well as other property. Finally, they would be required to dig graves in which they were buried, and sometimes, soldiers made them to kill each other until only one remained who finally was killed by a soldier. When the things occurred differently, the populations were connected arms to the legs, one will break their cranium with the old hoe, or one will insert into them blows of knives in the coasts until death followed. Pretexts to kill people so atrociously did not miss, they were for example asked to reveal the secrecies of the ruling MRND party or about the soldiers' combats' operational directives.²³² Others were stabbed until death. *Ruzibiza* remarked that the whole aim in this cruelty against civilians, was to charge the then Government of Rwanda as responsible of those cruel massacres.

This practice continued after RPF seized power in Rwanda on July 19, 1994. The Special Rapporteur noted in his August 12, 1994 report that there were also reports of disappearances and abductions, as well as summary executions. Members of the government implicitly acknowledge the facts. They do not, however, deny the facts that rogue elements of the RPF or the army may engage in such acts as reprisals.²³³

On November 11, 1994, the Special Rapporteur was informed of several cases of summary executions and even massacres and disappearances of persons for which civilians and, in particular, APR soldiers are alleged to be responsible. This information was supplied to him both by the relatives of the victims and by humanitarian non-governmental organisations. They refer not only to thousands of anonymous deaths, but also to lists of persons who, though few in numbers, are mentioned by name.²³⁴ In many instances, he visited massacre

²³² Abdul Josué Ruzibiza, *Rwanda: Testimony of Abdul Ruzibiza*, (free translation), page 8

²³³ *Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, August 12, 1994, para 9, 37 - 46. Other patterns of summary executions and other gross human rights violations are to be found in the *Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, July 25, 1994, para 22; *Letter dated 21 July 1994 from the Secretary – general addressed to the President on the Security Council*, 25 July 1994, at para. 9; *Letter dated 1 October 1994 from the Secretary – General addressed to the President on the Security Council*, 4 October 1994 and its annex; *Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, January 29, 1996, para 99 -104.

²³⁴ *Special Rapporteur Report of November 11, 1994*, para 38.

sites and witnessed mass graves containing bodies of which APR was alleged to be responsible²³⁵.

There is a great deal of evidence implicating the RPF and the current Government of Rwanda in the massacres of innocent civilians. Most of the violations fall under the jurisdiction of the ICTR, but there is a twofold problem in not prosecuting them and sometimes ignoring them and leaving the issue to time, possibly in the belief that as time passes, these violations will be forgotten.

The crucial evidence of RPF abuses of civilians was revealed following an investigation conducted by Human Right Watch Africa.²³⁶ According to the Human Rights Watch Report the RPF killed thousands, including non-combatants as well as government troops and members of militia. They also killed civilians in numerous summary executions and in massacres and slaughtered tens of thousands during the four months of combat from April to July.²³⁷ Virtually all persons killed by RPF forces were Hutu, but the RPF explicitly disavowed any hostility based on ethnic distinctions.²³⁸ The RPF responded to the genocide of Tutsis by that of Hutu. This counter - genocide theory, however, divides analysts for an apparent lack of evidence on the RPF side.

There is an unspeakable bias in investigating abuses by RPF.²³⁹ It was known for years that RPF closely monitored and controlled movements of foreigners in areas under its control. Journalists and representatives of humanitarian organisations rarely talked to Rwandese citizens under RPF control without an RPF official being present.²⁴⁰ The question is whether it was a normal course of affairs, but the general observation is that role players did not wish to implicate RPF so as to strengthen its path to power by whatever means used including

²³⁵ The Special Rapporteur personally visited a massacre site in Chamfunzo in the then Butare prefecture, *Report on the situation of human rights in Rwanda*, para 39.

²³⁶ Des Forges A, op. cit., p 701.

²³⁷ Des Forges A, op. cit., p 692.

²³⁸ Des Forges A., op. cit., p 693.

²³⁹ Although the subject of substantial speculation, the RPF slaughter of civilians has been poorly documented. Even during the months when the RPF was just establishing its control, it was remarkably successful in restricting access by foreigners to certain parts of the country. Such limitations fed the speculation about RPF abuses but, at the same time, made it extremely difficult to prove wrongdoing, HRW Report, (1999), op. cit.

²⁴⁰ Amnesty International, *Rwanda: Reports of killings and abductions by the Rwandese Patriotic Army, April – May 1994*, 20 October 1994, AI Index: AFR 47/16/94, p 2.

killing of innocent civilians and other forms of abuses. As one U.S. policymaker described the situation that they had three choices. Support the former genocidal government. That is impossible. Support the RPF. That is possible. Support neither. That is unacceptable because it might result in those responsible for genocide coming back to win.²⁴¹

The March 1993's Report of International Commission of Investigation on Human Rights in Rwanda since October 1, 1990 seems to be the first inquiry into violations committed since the outbreak of war. The Commission worked on this issue for two weeks, i.e., from January 7 to January 21, 1993. It was composed of a variety of human rights experts from all over the world.²⁴² The commission visited five of the eleven prefectures of Rwanda and gathered official reports and interviewed eyewitnesses from areas where the commission did not go apparently because the roads were blocked by political demonstrations.²⁴³

The commission gathered evidence from hundreds of witnesses and excavated two mass graves where victims of massacres had been buried. It investigated three major massacres, one in *Kibilira* commune in October 1990; the killing of *Bagogwe*, which took place in several communes from January through March 1991; and one in *Bugesera* in March 1992. In addition, it gathered evidence on other cases of communal violence, summary executions, assassinations and threats of assassinations, looting and destruction of property.²⁴⁴

The commission concluded that both the Government and the RPF were guilty of human rights abuses. Notwithstanding its conclusion regarding the implications of both warring parties, the Commission was only able to “ examine some of the human rights violations charged against the Rwandan Government and the RPF (...) nor was it able to travel to

²⁴¹ Des Forges A, op. cit., p 731.

²⁴² Those experts were Jean Carbonare, act together for Human Rights, Paris; Philippe Dahinden, doctor of Laws, journalist, Lausanne; René Degni-Ségui, Dean of the Law Faculty, University of Abidjan, President of the Ivorian League of Human Rights; Alison Des Forges, Africa Watch and State University of New York at Buffalo; Pol Dodinval, forensic physician, faculty of Medicine, Liège; Eric Gillet, International Federation of Human Rights, Member of the Bar of Brussels, Rein Odink, jurist, Amsterdam; Halidou Ouedraogo, President of the Interfrican Union of Human Rights, Ouagadougou, Judge of the Administration Chamber, Supreme Court of Burkina Faso; André Paradis, Director general of the League of Rights and Liberties, Montreal; William Schabas, Professor of Law, University of Quebec at Montreal, member of the Bar of Montreal.; *Report of the International Commission*, p 1.

²⁴³ *Report of the International Commission*, p. 3

²⁴⁴ *Ibidem*.

Uganda to interview displaced persons who might have provided Additional information on abuses by the RPF”.²⁴⁵ The Commission alleged that it had no time. The question is whether the commission could have divided itself in two so that both sides were investigated on equal footing. The commission appreciated the co-operation of the government and was welcomed by the president and the prime minister. It obtained oral and written testimony from several hundreds witnesses who represented the full range of the government officials and unemployed street kids, university professors and ordinary cultivators, Hutu and Tutsi, merchants and military, victims and confessed assailants, supporters and opponents to the regime.²⁴⁶

Surprisingly when it came to RPF side, the commission was able to choose its own witnesses but was not able to interview them privately.²⁴⁷ In most cases, RPF officers remained in the immediate vicinity, despite being asked on several occasions to leave the commission members alone with witnesses. In addition, many witnesses were filmed by the RPF, as they spoke with members of the commission.²⁴⁸ The commission did not bother to organise another visit or in any other way to overcome the difficulty it encountered or at least draw some inferences from this RPF behaviour.

Although it was the wish of the Rwandan government that an international commission of inquiry be set up, preferably under the auspices of the UN to shed light on all the human rights violations committed by the RPF, such commission never saw the light of day. The government specified that such commission should spend sufficient time in the zone under RPF control and be authorised to meet the witnesses it chooses to interview without RPF interference. It would also conduct investigations in Uganda in order to shed light on the cases of deported persons and prisoners of war, and in the concentration and forced-labour camps reportedly established by RPF.²⁴⁹

²⁴⁵ Id. p 3.

²⁴⁶ Id. p 9.

²⁴⁷ Id. p 9.

²⁴⁸ Id. p 39.

²⁴⁹ *Statement by the government of Rwanda concerning the Final Report of the International Commission of Inquiry on Human Rights violations in Rwanda since 1 October 1990, Annex II to the Final Report of the commission of Inquiry.*

In its final report, the Commission claimed once again that it was unable, due to lack of time, to uncover any evidence that Tutsi elements perpetrated acts with intent to destroy the Hutu ethnic group as such (...), nor could it find evidence that killings of Hutu perpetrated by a number of individual RPF soldiers were systematic, sponsored or even approved of, by Government officials or army commanders.²⁵⁰ The Commission noted that it remained disturbed by ongoing violence committed by some RPF soldiers and recommended that investigation of violations of IHL and human rights law abuses attributed to the RPF be continued by the Prosecutor for the International Tribunal for Rwanda.²⁵¹ This report dated December 9, 1994 when RPF was in full control of the whole territory of Rwanda, i.e. after 4 months of work beginning July 26, 1994.

Allegations of lack of information concerning RPF abuses and violations of human rights are also found in the Report of the Special Rapporteur, Mr. René Degni Ségui.²⁵² He noted that in the area controlled by the RPF, the cases of massacres reported are rather rare, indeed virtually non-existent, perhaps because little is known about them.²⁵³ Strengthening this view, Human Rights Watch remarked that wise caution was appropriate as the massacre at *Mukingi*, for example, was being carried out on June 19, during the four day period when the special rapporteur was in Rwanda.²⁵⁴ It can be argued that the Special rapporteur did not have enough time to investigate, but did he attempt to do anything at all? In his report of August 12, 1994, he only reserved paragraph 9 to violations committed by RPF. He claimed that nothing was happening and that some massacres going on were attributable to militia.

It is the same scenario when one looks at the Report of the Special Rapporteur on extra-judicial, summary or arbitrary execution. He pointed out that:

In view of the lack of information concerning the situation on the ground, and in the light of the inaccessibility of the area in question and the limited time available to the Special Rapporteur, it was extremely difficult for him to form a personal opinion on the matter during

²⁵⁰ *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), S/1994/1405*, December 9, 1994, para 98.

²⁵¹ *Final Report of the Commission of Experts*, para 100.

²⁵² *Report on the situation of Human Rights in Rwanda, by Mr. René Degni- Ségui, Special Rapporteur of the Commission on Human Rights under paragraph 20 of Commission' Resolution E/CN.4/S-3/1* of May 25, 1994, E/CN/4/1995/7, 28 June 1994, para 22 – 24.

²⁵³ *Report on the situation of Human Rights in Rwanda*, para 22.

²⁵⁴ Des Forges A., *op. cit.* , p 679

his mission to Rwanda. On the other hand, he was able to meet reliable individuals who convinced him that these summary executions did actually take place. It is accordingly important that a more extensive investigation should be held, covering not only the areas under RPF control, but also certain border regions situated in Ugandan territory.²⁵⁵

This behaviour in investigating RPF violations of Humanitarian Law was a calculated policy of covering up those violations. This is more emphasised by Human Right Watch in the famous *Robert Guersony* mission. In the proper wordings of HRW, a UNHCR team dispatched for another purpose gathered the first convincing evidence of widespread, systematic killings by the RPF. When the team and the head of the UNHCR attempted responsibly to bring the information to the attention of the international community, the U.N. decided to suppress it, not just in the interest of the recently established Rwandan government but also to avoid further discredit to itself. The U.S., and perhaps other member States, concurred in this decision, largely to avoid weakening the new Rwandan government.²⁵⁶

The team has, however, made efforts to gather as much information as possible and worked from August 1 through September 5, and visited 91 sites in 41 of the 145 communes of Rwanda. They also conducted investigations in nine refugee camps around Rwanda with individuals and another one hundred discussions with small groups. The information they got was detailed and convincing and it was confirmed by independent sources in other camps or inside Rwanda. The team noted that some field officers of UNHCR, operating independently of them had collected similar accounts from refugees fleeing Rwanda at various points along the borders.²⁵⁷ In addition, UNHCR representatives had inadvertently discovered a large number of bodies when they made an unannounced visit to a stadium in Kigali which they were considering using for a transit centre. They had also heard reports in Kigali that there was a special RPF squad designated for getting rid of the bodies of Hutu who had been killed and that it burned many of those bodies.²⁵⁸

²⁵⁵ *Report by Mr. B.W. Ndiaye, Special Rapporteur on his mission to Rwanda from 8 to 17 April 1993*, E/CN.4/1994/7/Add.1, August 11, 1993, para 43.

²⁵⁶ Des Forges A, (1999), op. cit., p 733.

²⁵⁷ Id.

²⁵⁸ Ibidem.

3.2.4 Competence *ratione loci*: Territory of Rwanda and neighbouring States.

With respect to serious violations of international humanitarian law committed by Rwandese citizens, the territorial jurisdiction of the Tribunal extends beyond the territory of Rwanda to that of neighbouring states. This permits the Tribunal to investigate and prosecute such violations by Rwandese citizens committed in refugee camps in (former) Zaire (now the Democratic Republic of Congo) and other neighbouring countries where violations are alleged to have been committed in connection with the events in Rwanda.²⁵⁹ It was also designed to encompass the broadcasting from *Radio Télévision Libre des Mille Collines* and other radio stations, which throughout the conflict had incited the genocide of Tutsi, and which since the fall of the Hutu regime have reportedly broadcasted from a mobile base outside Rwanda.²⁶⁰

The events that followed the death of President Habyarimana on April 06, 1994 led millions of Rwandans who were residing in Rwanda to flee to neighbouring states mainly the former Zaire, Tanzania, Burundi and probably Uganda. Later on the movement continued and peoples reached Kenya and other countries. However, the countries of major concern were Zaire, Tanzania and Burundi. The question is then to know whether crimes are alleged to have been committed within the territories of States other than Rwanda and by whom.

When we look at the founding reports of the UN with regard to this part of the Tribunal competence, it seems that the only available information concerned the lack of security in the refugees' camps following their influxes especially in July 1994. No crimes are alleged to have been committed in the refugees' camps, be it in Zaire, Tanzania or Burundi. The report of the UN Secretary General of November 18, 1994, expressed concerns at the plight of the millions of Rwandan refugees and displaced persons and deplored the continuing acts of

²⁵⁹ Amnesty, op. cit., p 10

²⁶⁰ EJIL, "The International Criminal Tribunal for Rwanda", available at <http://www.ejil.org/journal/Vol7/No4/art3-03.html>, accessed on 18/02/2005.

intimidation and violence within the refugee camps, which were designed to prevent the refugee population there from returning home²⁶¹.

This report does not deal with any crimes or other violations of international law that were actually committed in the refugees' camps and which fall within the material jurisdiction of the ICTR. To mark the importance of this report, the Secretary General noted that following consultations between the Secretariat and UNHCR on possible options for addressing the security situation in the camps, he convened a high-level meeting in Geneva on November 8, 1994 which focused on various aspects of the crisis in Rwanda and most importantly on the situation in the refugee camps. The meeting concluded that the most urgent problems at that time were the security in the camps and the Government's need (the newly established Rwandan Government of RPF) for support to enable it to carry out its functions²⁶². Even if the second report came after the adoption of Resolution 955, it strengthened the findings laid down in the November 18, 1994 report.

The aim of the Second Report of the Secretary-General on Security in the Rwandan Refugee Camps was to explore, *as appropriate*, all possible means of addressing the problems of security in the Rwandan refugee camps²⁶³. It is also worthy to note that while the Secretary General was convening the meeting in Geneva on November 8, 1994; the SC was adopting Resolution 955 the same day. It is then surprising that apparently the SC anticipated information that was not yet available to the Secretary General, and would not appear in the following two Secretary General reports. It should be stressed that when the SC established the ICTR, the major concern was to halt acts of genocide in Rwanda and to bring perpetrators to account for their acts. There were no allegations whatsoever that acts of genocide, crimes against humanity and war crimes had been committed in any of the neighbouring states. There were no reports specifically addressing these matters in any particular states other than Rwanda.

²⁶¹ *Report of the Secretary-General on Security in the Rwandan Refugee Camps*, S/1994/1308, November 18, 1994, para 1.

²⁶² *Report of the Secretary-General on Security in the Rwandan Refugee Camps*, para 4 - 5.

²⁶³ *Second Report of the Secretary-General on Security in the Rwandan Refugee Camps*, S/1995/65, January 25, 1995, para 1.

Other founding materials would be SC Resolution 935 of July 1, 1994²⁶⁴ and Resolution 955 of November 8, 1994²⁶⁵. The first resolution recalls a statement made by the President of the SC on April 30, 1994 wherein, *inter alia*, the Council condemned all breaches of IHL in Rwanda, particularly those committed against the civilian population. It also referred to Resolution 918(1994) concerning the investigation of serious violations of international humanitarian law committed in Rwanda during the conflict.

In the Preamble to Resolution 955²⁶⁶, the SC recalls the work done by the Commission of Experts established pursuant to Resolution 935, in particular its preliminary report on violations of IHL in Rwanda and expressed grave concern towards indications that genocide and other systematic, widespread and flagrant violations of IHL had been committed in Rwanda. In the same resolution, the Council urged the Commission to “continue, on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda (...)”²⁶⁷. It clearly appears that resolution 955 of November 8, 1994 preceded the Secretary General Report dated November 18, 1994. Neither the resolution nor the report expressly referred to allegations of grave breaches of the Geneva conventions in any other territory but Rwanda. The Secretary General’s report looked at security issues in the refugees’ camps particularly in the former Zaire but nothing else.

There was no suggestion whatsoever that violations of IHL were committed elsewhere. These considerations raise the question about the need to expand the territorial jurisdiction of the ICTR outside Rwanda where it is clear that no material facts took place. It may also be a diversion of the problem where the SC failed to look at all real territories where crimes could be alleged. It is common knowledge that many Rwandans were abducted in the course of the conflict and brought to Uganda where they were executed by RPF military forces. But this

²⁶⁴ S.C. Res. 935, U.N. SCOR, 49th Year, 3400th mtg., at 1, U. N. Doc. S/RES/935 (1994); *Report of the Secretary General on the establishment of the Commission of Experts pursuant to paragraph 1 of Security Council Resolution 935 (1994) of July 1, 1994*, July 26, 1994, S/1994/879.

²⁶⁵ Reproduced as appendix D: Security Council Resolutions 935 and 955 (including the Statute of the International Criminal Tribunal for Rwanda), in Clark R. S and Sann M, *op. cit.*, pp. 483 – 502.

²⁶⁶ Adopted by a vote of 13 – 1 – 1 by the Security Council at its 3453rd meeting, November 8, 1994. S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. At 1, U.N. Doc. S/RES/955 (1994).

²⁶⁷ *Ibidem*.

issue was not raised apparently because no one was prosecuting any RPF member or any Ugandan who could have been involved in the violations of IHL.

Another possible explanation could be that the SC wished to prosecute the former Government leadership, military and militias who were allegedly responsible of crimes committed exclusively in Rwanda. Another hypothesis is that the Council believed that criminals could carry on with violations of IHL even in the camps. If this hypothesis is false then there is no explanation that can be given to the extension of the geographical mandate of the ICTR outside the borders of Rwanda. No one has yet been indicted by the ICTR for acts falling out of the Rwandan Republic borders.

Chapter 4: ICTR jurisprudence and assessment

Sub – Chapter 1: Cases decided by the ICTR.

The facts that will be examined here are those that constitute the foundation for the applicability of article 4 of the Statute. Although these facts may constitute evidence of genocide or crimes against humanity, they will only be looked at as proof of serious violations of IHL in armed conflicts. This work analyses cases that were heavily referenced to in developing the jurisprudence in the area of serious violations of IHL. The selected cases are: *Akayesu*, *Kayishema and Ruzindana*, *Rutaganda*, *Musema*, *Semanza Imanishimwe* (*Cyangugu* case), and *Kamuhanda*. One of the necessary material elements for a finding of violations of IHL is the existence of an armed conflict and the character of that armed conflict. To characterise the conflict in Rwanda, the ICTR relied mainly on the doctrine of judicial notice. This doctrine will be briefly analysed in this chapter before a global assessment of the state of the ICTR jurisprudence is made.

4.1.1 The *Akayesu* case²⁶⁸

4.1.1.1 Facts

The charges against Jean-Paul Akayesu were contained in an indictment “submitted by the Prosecutor on February 13, 1996 and was confirmed on February 16, 1996. It was amended during the trial, in June 1997, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A and 12B)”.²⁶⁹ Akayesu responded to five counts charging him of serious violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto.²⁷⁰ The facts of the charges were murder (counts 6, 8 and 10) pursuant to article 4(a) of the Statute; while counts 12 and 15 alleged cruel treatment pursuant to article 4(a) and outrages upon personal dignity, in particular humiliating

²⁶⁸ *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR - 96 - 4 - T, October 02, 1998. Jean – Paul *Akayesu* was a former mayor of the Taba Commune in the province of *Gitarama*, in Rwanda. On September 2, 1998, he was convicted of genocide, direct and public incitement to commit genocide and crimes against humanity for extermination, murder, rape, torture and other inhumane acts. He was sentenced to life imprisonment. On 1 June 2001, the appeals Chamber affirmed the verdict of guilty entered against him on all counts.

²⁶⁹ *Akayesu*, (TC), para 6.

²⁷⁰ *Akayesu*, (TC), para 638.

treatment and indecent assault, pursuant to article 4(2)(e) of the Statute. Whereas counts 6, 8, 10 and 12 relate only to violations of Common Article 3 of the Geneva Convention, count 15 adds Additional Protocol II.²⁷¹

Paragraphs 19 and 20 of the indictment alleged that Akayesu ordered the killing of 8 detained men and other five men in front of a communal office. The events allegedly occurred during a distinct period on or about April 19, 1994 at the *bureau communal*²⁷² of Taba, in the Prefecture of *Gitarama* in the Republic of Rwanda. At another location in the same commune, on or about April 19, 1994, Akayesu named two men and accused them of ties with the RPF. Later that day one man was killed while the other was clubbed to death in front of Taba *bureau communal* within the next few days.²⁷³

4.1.1.2 Applicable law and decision.

The first legal issue to be determined by the Chamber in this case, was whether there existed in Rwanda, during the period alleged in the indictment, an armed conflict not of an international character. The Chamber did not, on its own, determine the nature of the conflict but relied solely on the considerations arrived at by the Security Council in establishing the ICTR. In this respect the Chamber held that:

a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor for it to categorise the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. (...) Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question', as long as the conflict were covered, at the very least, by the customary norms of Common Article 3.²⁷⁴

It is quite interesting to note that the Chamber agrees that some other approaches can also be considered in determining the nature of the conflict at issue. Although there was no basis for immediately characterising the conflict as “non international” in nature, the Chamber believed that it was to be so characterised by the fact that Protocol II was included in the

²⁷¹ Akayesu, (TC), para 607.

²⁷² Akayesu, (TC), paras 270 – 271.

²⁷³ Akayesu, (TC), para 363.

²⁷⁴ Akayesu, (TC), para 606.

subject matter of its competence. It in fact deduced a characterisation from the position of the S C. The Chamber elaborated on the kind of hostile actions that may be characterised as conflicts falling under Article 3 and the ones falling under Protocol II. The Chamber held:

The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to "armed conflicts not of an international character", whereas for a conflict to fall within the ambit of Additional Protocol II, it must "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application.²⁷⁵

In factually assessing the existence of the two legal requirements, namely the armed conflict as such and its intensity, the Chamber further held that having regard to evidence presented before it, there was a civil war between two groups, namely the governmental forces, the FAR, and the RPF:

Both groups were well-organised and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special *rapporteurs*, were unanimous in characterising the confrontation between the two forces as a war, an internal armed conflict.²⁷⁶

UNAMIR here refers to a single statement, one sentence pronounced by Major General Romeo Dallaire. Neither the prosecution, nor the defense questioned him on the statement. Based on the foregoing, the Chamber found there existed at the time of the events alleged in the indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions²⁷⁷ and Additional Protocol II thereof.

²⁷⁵ *Akayesu*, (TC), para 602

²⁷⁶ *Akayesu*, (TC), para 621.

²⁷⁷ *Akayesu*, (TC), para 621.

Another element that was relied upon and which undermined the case of the prosecution was the link between the armed conflict and the conduct of the accused, *Jean Paul Akayesu*. In this regard, the Chamber did not elaborate on the applicable law but concluded that the Prosecutor failed to demonstrate, by adducing evidence, the position of the accused.²⁷⁸ According to the Chamber, the Prosecutor had to prove that *Akayesu* acted on behalf of one or another part to the conflict in the execution of their respective conflict objectives. This would imply that the prosecution had to prove that, “by virtue of his authority, he (*Akayesu*) was either responsible for the outbreak of hostilities or otherwise directly engaged in the conduct of hostilities.”²⁷⁹ The fact that he was a civilian did not count at all. The Chamber was not satisfied by the fact that *Akayesu* wore a military jacket and carried a rifle and provided limited assistance to the army.²⁸⁰ These indicia were not, in the opinion of the Chamber, sufficient and significant to establish that the accused actively supported the war effort.

The prosecution appealed against the judgment of the Trial Chamber in that it was based on an agency test. The prosecution argued that article 4 of the Statute does not make any mention of a possible delimitation of class of persons likely to be prosecuted under it.²⁸¹ It further submitted that there is no explicit provision in the Statute that individual criminal responsibility is restricted to a particular class of perpetrators.²⁸² The prosecution rightly suggested that the perpetrators of serious violations of IHL, as provided for in article 4 of the Statute, do not need to have, as of necessity, a link with one of the parties²⁸³ in conflict and that punishment applies to everyone without distinction.²⁸⁴ In finding in favour of the prosecution, the Appeals Chamber held that the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for violation of article 4 of the Statute.²⁸⁵

²⁷⁸ *Akayesu*, (TC), para 640.

²⁷⁹ *Akayesu*, (TC), para 640.

²⁸⁰ *Akayesu*, (TC), para 642.

²⁸¹ *Akayesu*, (AC), para 435.

²⁸² *Akayesu*, (AC), para 436.

²⁸³ *Akayesu*, (AC), para 437.

²⁸⁴ *Akayesu*, (AC), para 443.

²⁸⁵ *Akayesu*, (AC), para 244; see also para 437 of the *Akayesu* Appeal Judgment where the Chamber remarks that no criminal responsibility of alleged violator was intended in article 3 Common to the Geneva Conventions, the French text reads as follows:

The Appeals Chamber relied on the principle that the four Conventions were adopted primarily to protect the victims as well as potential victims of armed conflicts. The Trial Chamber initially had held that “[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces”.²⁸⁶ In the opinion of the Appeals Chamber, such a finding is *prima facie* not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close *nexus* between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. The Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.

4.1.2 The *Kayishema* and *Ruzindana* case²⁸⁷

4.1.2.1 Facts

Count 5 of the amended indictment of April 11, 1997 charged accused *Kayishema* of violation of article 3 Common to the Geneva Conventions, a violation of article 4(a) of the Statute of the ICTR, while count 6 concerns violation of Additional Protocol II pursuant to article 4(a) of the Statute. The facts of the charges concerned alleged massacres that took place at the Catholic Church in the town of Kibuye and Home *Saint Jean* on or about April

Force est de constater que non seulement l'article 3 commun aux Conventions de Genève ne précise pas quelles sont les personnes visées par ses dispositions mais qu'il ne prévoit pas non plus de référence explicite à la responsabilité pénale de l'auteur de sa violation. Le chapeau de l'article indique uniquement que « chacune des Parties au conflit sera tenue d'appliquer au moins les dispositions suivantes ». Cette assertion a principalement pour objectif de souligner le caractère « inconditionnel »²⁸⁵ de l'obligation de chacune des Parties d'assurer un minimum de protection aux personnes visées par l'article. Selon la Chambre d'appel, il ne s'ensuit pas que l'auteur d'une violation de l'article doit nécessairement avoir un lien déterminé avec une des Parties précitées.

²⁸⁶ *Akayesu*, (TC), para 630.

²⁸⁷ *Kayishema* and *Ruzindana* case involves 2 accused, Clément *Kayishema* and Obed *Ruzindana*. The former was a prefect in the province of Kibuye. He was convicted of genocide and crimes against humanity and sentenced to life imprisonment. The Appeals Chamber affirmed the verdict and the sentence on all counts. Obed *Ruzindana* was a former businessperson and was convicted of genocide and sentenced to imprisonment for a term of 25 years, confirmed by the Appeals Chamber.

17, 1994. The indictment alleged that Clément *Kayishema* ordered the gathering of men, women and children at those two sites (Catholic Church and Home *Saint Jean*) and that he later ordered members of the *Gendarmerie Nationale*, communal police of *Gitesi*, members of the *Interahamwe* and armed civilians to attack the sites. It was alleged that he also participated in the attack.²⁸⁸

Count 11 charged the accused of violations pursuant to article 4(a) of the Statute, and count 12 charged him of violation of Additional Protocol II, article 4(a) of the Statute. The alleged facts concerning these two counts allegedly took place at the Stadium of *Kibuye* Town on or about April 18, 1994. The prosecution alleged that *Kayishema* ordered men, women and children to seek refuge in the stadium and that then the victims were surrounded by persons apparently under the accused's control including members of the *Gendarmerie Nationale*. It was further alleged that *Kayishema* initiated the attack by firing a gun into the air.²⁸⁹ The alleged attack lasted two days and resulted in thousands of deaths and numerous injuries.

In all the above counts, *Kayishema* was charged under article 6(1) for his personal participation and, under article 6(3), that he did not take measures to prevent the attack from occurring and, after the attack that he did not punish the perpetrators.²⁹⁰

Count 17 and 18, 23 and 24 charged the accused with violation of article 4 of the Statute for massacres committed at two sites: namely at a church in *Mubuga*, on or about April 14, 1994; and in the area of *Bisesero* on or about April 9, 1994 through to about June 30, 1994. It is alleged that before the attack at *Mubuga*, Clément *Kayishema* did not take measures to prevent the attacks, and after the attacks he did not punish the perpetrators.²⁹¹

Co-accused Obed *Ruzindana* was charged with these violations in only the last two counts, namely counts 23 and 24.

²⁸⁸ *Kayishema and Ruzindana*, (TC), para 27 and 28 of indictment.

²⁸⁹ *Kayishema and Ruzindana*, (TC), Indictment, para 32 – 35.

²⁹⁰ *Kayishema and Ruzindana*, (TC), Indictment, paras 33, 37.

²⁹¹ *Kayishema and Ruzindana*, (TC), Indictment, para 43.

It is also important to note the strategy of the prosecution whereby in four sets of counts, one set charged for violations of Common Article 3 (count 5, 11, 17 and 23) while a subsequent set (6, 12, 18 and 24) charged violations of Additional Protocol II for acts provided for in article 4(a) of the Statute, murder in particular. It is in fact the same acts that are charged both under common article 3 and under Additional Protocol II.

4.1.2.2 Applicable law and decision.

The Chamber considered that the question before it was not whether article 4 of the Statute was applicable to the situation at issue but instead to what extent it was applicable in the instant case.²⁹² For the Trial Chamber, the crimes charged were also punishable under the laws of Rwanda²⁹³ in 1994, and both warring parties were bound by the provisions of IHL applicable in time of war. The Prosecution advanced five requirements for the applicability of Common Article 3 and Additional Protocol II. It submitted that

- a. “the alleged crime(s) must have been committed in the context of a non-international armed conflict”²⁹⁴,
- b. “temporal requirements for the applicability of the respective regime must be met”²⁹⁵,
- c. “territorial requirements for the applicability of the respective regime must be met”²⁹⁶,
- d. “the individual(s) charged must be connected to a Party that was bound by the respective regime”²⁹⁷; and
- e. “the victims(s) of the alleged crimes(s) must have been individual(s) that was (were) protected under the respective regime”²⁹⁸.

The Chamber adhered to the proposition put forward by the Prosecution as to the first three requirements²⁹⁹. The Chamber held that:

the question which should be addressed is not whether Common Article 3 and Protocol II were applicable to “the situation in Rwanda in 1994,” but whether these instruments were applicable to the alleged crimes at the four sites referred to in the Indictment. It is incumbent

²⁹² *Kayishema and Ruzindana*, (TC), para 158.

²⁹³ *Kayishema and Ruzindana*, (TC), para 157.

²⁹⁴ *Kayishema and Ruzindana*, (TC), para 594

²⁹⁵ *Ibidem*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Kayishema and Ruzindana*, (TC), para 597.

on the Prosecutor to prove the applicability of these international instruments to the above-mentioned crimes.³⁰⁰

In assessing condition one, however, the Chamber found that the prosecution did not clarify the meaning of the words “in the context”³⁰¹ of a non international armed conflict. On this specific issue, the Chamber held

If she (the Prosecution) meant “during” an internal armed conflict, there is nothing to prove as it was recognised, and this matter was not in dispute, that in this period of time Rwanda was in a state of armed conflict not of international character. Therefore, in this case the words “in the context” are too general in character and do not clarify the situation in a proper way. When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of this conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the victims of these crimes are victims of the armed conflict.

From this point of view, the Chamber inadvertently introduced requirement five of protected persons which was to be determinant on this matter. In the view of the Chamber, the Tutsi were attacked neither by the FAR nor by RPF. The attacks on them were initiated and controlled by civilian authorities. The Chamber therefore found that the Prosecution failed to establish a nexus between the committed crimes and the armed conflict³⁰². For it, the term “nexus” is not to be understood vaguely. It needs to be proved factually as a direct connection between the alleged crimes, referred to in the indictment, and the armed conflict.³⁰³

In further developments, the Chamber came to the agent test propounded in *Akayesu*. The Chamber pointed out that both accused were not members of the armed forces. However, civilians could be connected with the armed forces if they were directly engaged in the conduct of hostilities or the alleged civilians were legitimately mandated and expected, as persons holding public authority or *de facto* representing the Government, to support or fulfil

³⁰⁰ *Kayishema and Ruzindana*, (TC), para 598.

³⁰¹ *Kayishema and Ruzindana*, (TC), para 600.

³⁰² *Kayishema and Ruzindana*, (TC), para 602.

³⁰³ *Kayishema and Ruzindana*, (TC), para 604.

the war effort.³⁰⁴ In this case, “the Prosecution did not produce any evidence to show how and in what capacity Kayishema and in particular Ruzindana, who was not a public official, were supporting the Government efforts against the RPF.”³⁰⁵ Turning to the crimes committed as such, the Chamber recalled a statement by the International Committee of the Red Cross stating that in time of war IHL coexists with human rights law “certain provisions of which cannot be derogated from. Protecting the individual *vis-à-vis* the enemy, (as opposed to protecting the individual *vis-à-vis* his own authorities) is one of the characteristics of the law of armed conflicts.”³⁰⁶ The Chamber concluded that “*pleno jure*, the material provisions of Common Article 3 and Protocol II had not been violated in this particular case”³⁰⁷ and that “both accused persons, *ipso facto et ipso jure*, could not be held individually responsible for violations of these international instruments.”³⁰⁸

4.1.3. The *Rutaganda* case³⁰⁹

4.1.3.1. Facts

Georges Anderson Rutaganda was charged with violations of IHL on three counts, all for murder under article 4 (a) of the Tribunal Statute. The indictment alleged that

“on or about April 11, 1994, immediately after the UNAMIR Belgian soldiers withdrew from the *ETO (Ecole Technique Officielle)* of Kigali, members of the Rwandan armed forces, the gendarmerie and militia, including the *Interahamwe*, attacked the ETO school and, using machetes, grenades and guns, killed the people who had sought refuge there. The *Interahamwe* separated Hutus from Tutsis during the attack, killing the Tutsis. Georges RUTAGANDA participated in the attack at the ETO school, which resulted in the death of a large number of Tutsis.”³¹⁰

The indictment further alleged that

³⁰⁴ *Kayishema and Ruzindana*, (TC), para 617.

³⁰⁵ *Kayishema and Ruzindana*, (TC), para 618.

³⁰⁶ ICRC, Report of the Meeting of Experts, October 1998, cited in *Kayishema and Ruzindana*, (TC), para 622.

³⁰⁷ *Kayishema and Ruzindana*, (TC), para 623.

³⁰⁸ *Ibidem*.

³⁰⁹ Georges Anderson *Nderubumwe Rutaganda* was a former *Interahamwe* youth wing leader. He was convicted of genocide and crimes against humanity for extermination and murder. He was sentenced to life imprisonment. The Appeals Chamber confirmed the conviction for genocide and extermination as a crime against humanity, but overturned the conviction of murder. It however entered two new convictions for murder as a violation of Common Article 3 of the Geneva Conventions and Additional Protocol II.

³¹⁰ *Georges Anderson Rutaganda's* Indictment, para 14, cited in *Rutaganda*, (TC), para 4.

men, women and children who survived the ETO school attack were forcibly transferred by Georges RUTAGANDA, members of the *Interahamwe* and soldiers to a gravel pit near the primary school of Nyanza. Presidential Guard members awaited their arrival. More *Interahamwe* members converged upon Nyanza from many directions and surrounded the group of survivors.³¹¹

All the people were required to produce their identity documents.

Tutsis who presented altered identity cards were immediately killed. Most of the remainder of the group were attacked and killed by grenades or shot to death. Those who tried to escape were attacked with machetes. Georges RUTAGANDA, among others, allegedly directed and participated in these attacks.³¹²

It is alleged that these event took place on or about April 12, 1994.

The same pattern of events were allegedly repeated on or about April 28, 1994. Some residents of Kigali Town were collected and detained near a garage owned by the accused. A man named Emmanuel *Kayitare*, among others, was separated from the group and later that day attempted to flee but Georges *Rutaganda*³¹³ “pursued him, caught him and struck him on the head with a machete and killed him.”³¹⁴

4.1.3.2. Applicable law and decision.

In adjudicating this case, the Chamber recalled the crucial requirement for the applicability of Common article 3 and Additional Protocol II. The Chamber held:

Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to "armed conflict not of an international character" and Additional Protocol II, applicable to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".³¹⁵

³¹¹ *Rutaganda's Indictment*, para 15, also cited in *Rutaganda*, (TC), para 4.

³¹² *Rutaganda's Indictment*, para 16, *Ibidem*.

³¹³ *Indictment*, para 18, cited in *Rutaganda*, (TC), para 4

³¹⁴ *Ibidem*

³¹⁵ *Rutaganda*, (TC), para 91.

The first question that preoccupied the Chamber was that of the existence of an armed conflict which the Chamber considered as having no absolute definition. It relied on the evaluation test set up in *Akayesu* looking at the intensity of the confrontation between the parties as well as their level of organisation.³¹⁶ Whereas this test fits the criteria for applicability of Common Article 3, it does not suffice for the applicability of Additional Protocol II. The Chamber was mindful that Protocol II develops and supplements Common article 3 “without modifying its existing conditions of applicability.”³¹⁷ The Chamber agreed that “conflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3”³¹⁸, and that “Additional Protocol II is immediately applicable once the defined material conditions have been fulfilled.”³¹⁹ The Chamber endorsed the four conditions necessary for applicability of Protocol II as provided for in article 1(1) thereof. The Chamber also opined that a violator of Common Article 3 needs to belong to one of the warring parties for this provision to apply while for Additional Protocol II, the culprit must belong to the armed forces.³²⁰ It is not quite clear whether this understanding is the right one. When all these conditions are satisfied, there must be established a *nexus* between the offence and the armed conflict. This means that “the offence must be closely related to the hostilities or committed in conjunction with them”³²¹.

The Chamber held that at all times relevant to the indictment, there existed an armed conflict of a non-international character in Rwanda between the FAR and RPF.³²² The Chamber looked at the position of the accused and found him a person with authority over the *Interahamwe* militia, as a would-be military commander. He therefore falls within the category of persons who can be held criminally responsible for violations under article 4 of the statute. Notwithstanding these findings the Chamber held that:

in the opinion of the Chamber, although the genocide against the Tutsis and the conflict between the RAF and the RPF are undeniably linked, the Prosecutor cannot merely rely on a

³¹⁶ *Rutaganda*, (TC), paras 92 – 93.

³¹⁷ *Rutaganda*, (TC), para 94.

³¹⁸ *Ibidem*.

³¹⁹ *Id.*

³²⁰ *Rutaganda*, (TC), para 96.

³²¹ *Rutaganda*, (TC), para 104.

³²² *Rutaganda*, (TC), paras 439 – 440.

finding of genocide and consider that, as such, serious violations of Common Article 3 and Additional Protocol II are thereby automatically established. Rather, the Prosecutor must discharge her burden by establishing that each material requirement of offences under Article 4 of the Statute are met.³²³

This decision was a surprise because it was drawn from nowhere. The Chamber rejected the prosecution case because, in its opinion, it was not “proved beyond a reasonable doubt that there existed a *nexus* between the culpable acts committed by the accused and the armed conflict.”³²⁴

The prosecution appealed against this judgment. The Appeals Chamber considered the distinction between a war crime and a purely domestic offence and sustained that “a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed.”³²⁵ Some form of policy need not have supported it. “The armed conflict needs not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”³²⁶

The Chamber further set out the criteria to be relied upon when determining whether an act in question is sufficiently related to the armed conflict. To this end, the Appeal Chamber emphasised that “the Trial Chamber may take into account, *inter alia*, the following factors: (a) the fact that the perpetrator is a combatant; (b) the fact that the act may be said to serve the ultimate goal of a military campaign; (c) the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”³²⁷

In the case under review, the Prosecutor’s argument was “that the *Interahamwe* orchestrated massacres as part of their support of the RAF in the conflict against the RPF”³²⁸, and that

³²³ *Rutaganda*, (TC), para 443.

³²⁴ *Rutaganda*, (TC), para 444.

³²⁵ *Rutaganda*, (AC), para 569 (Citing para 58 of Trial Chamber Judgment).

³²⁶ *Ibidem*.

³²⁷ *Rutaganda*, (AC), para 569 (Citing para 59 of Trial Chamber Judgment), numbering format (a), (b), (c) added by author.

³²⁸ *Rutaganda*, (AC), para 558, (Citing para 442 of Trial Chamber Judgment)

“the accused was in a position of authority over the *Interahamwe* (and) that, *ipso facto*, his acts formed part of that support.”³²⁹ Such a conclusion was deemed insufficient by the Trial Chamber to prove beyond reasonable doubt that the accused was individually criminally responsible for serious violations of common article 3 and Additional Protocol II.³³⁰ The Appeals Chamber noted “that the error alleged by the Prosecutor does not concern as such the factual conclusion reached by the Trial Chamber; rather, it concerns the Trial Chamber’s refusal to make a last inferential leap.”³³¹ In this case, “the role of RAF troops in directing the activities of the *Interahamwe* makes particularly clear the unreasonableness in failing to find the required nexus.”³³² The Appeals Chamber reviewed the verdict on the counts regarding serious violations of article 4 of the Statute. It reversed “the acquittal on Counts 4 and 6 and found the Appellant guilty of murder as violation of common Article 3 of the Geneva Conventions.”³³³

4.1.4. The Musema case³³⁴

4.1.4.1. Facts.

The facts of this case are briefly summarised as follows: “the initial indictment against Alfred Musema was submitted by the Prosecutor on 11 July 1996, and was confirmed by Judge Yakov A. Ostrovsky on 15 July 1996.”³³⁵

On 14 December 1998, the Chamber confirmed an amended Indictment, submitted on 20 November 1998 by the Prosecutor. In this Indictment, the count of Complicity in Genocide was added *alternatively* to the existing count of Genocide. The Prosecutor submitted a second significantly amended Indictment on 29 April 1999, which the Chamber confirmed on 6 May 1999.³³⁶

³²⁹ *Ibidem*.

³³⁰ *Id.*

³³¹ Rutaganda, (AC), para 573

³³² Rutaganda, (AC), para 579 (the footnote is omitted)

³³³ Rutaganda, (AC), para 589

³³⁴ Alfred *Musema* was a former director of a Tea factory in the Province of Kibuye. He was convicted of genocide and crimes against humanity (extermination and rape). He was sentenced to life imprisonment. The Appeals chamber affirmed the verdict of guilty entered against him for genocide and extermination as a crime against humanity, but overturned the conviction for rape.

³³⁵ *Musema*, (TC), para 7 (note however the different date format, i.e. July 11, 1996 instead of 11 July 1996), the same format is adopted all over the work.

³³⁶ *Musema*, (TC), para 8

The Prosecutor's charges contained in this final version of the indictment were the basis of the *Musema* judgment.³³⁷

The indictment against *Musema* does not clearly state under which specific provision of article 4 of the statute he was charged. But if one looks at the facts of the case, it is obvious that he was charged under article 4(a) and (e) of the Statute, namely for murder, mutilation, torture, humiliating and degrading treatments, rape and indecent assault.

The alleged facts took place in the area of *Bisesero*, in the *Gishyita* commune, in the Prefecture of *Kibuye*, in the Republic of Rwanda. *Musema* was a director of a local tea factory. It is alleged that from April 9, through June 30, 1994, “thousands of men, women and children predominantly Tutsis sought refuge in that area”³³⁸. Alfred *Musema* is believed to have “brought to the area of *Bisesero* armed individuals and directed them to attack”³³⁹ and kill the refugees. He also “personally attacked and killed persons seeking refuge in *Bisesero*.”³⁴⁰ Those attacks “resulted in thousands of deaths and numerous injuries to the men, women and children within the area of *Bisesero* in *Gisovu* and *Gishyita* communes, *Kibuye* Prefecture.”³⁴¹

4.1.4.2. Applicable law and decision.

The Chamber, applying the principle of *nullum crimen sine lege*, was, to first assess whether the legal instruments incorporated in article 4 of the ICTR Statute apply to the matter it was seized with. After recalling the jurisprudence in *Akayesu*, *Kayishema and Ruzindana* as well as *Rutaganda*, the Chamber confirmed the binding nature of the instruments. According to the Chamber:

at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and

³³⁷ *Ibidem*

³³⁸ *Musema*, (TC), para 362, citing para 4.4 of the indictment

³³⁹ *Musema*, (TC), para 362, citing para 4.6 of the indictment

³⁴⁰ *Ibidem*.

³⁴¹ *Musema*, (TC), para 362, citing para 4.11 of the indictment

convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.³⁴²

The remaining question before the Chamber was therefore to what extent these instruments were applicable to the instant case. The Chamber then assessed whether the material requirements for the applicability of Common Article 3 to the Geneva Convention and Additional Protocol II were met in this case. To make a finding on the existence of an internal armed conflict in Rwanda during the timeframe covered by the indictment, the Chamber relied on the evaluation test as set up in the *Akayesu*³⁴³ case which was also followed in *Rutaganda*.³⁴⁴ This test requires an evaluation of the intensity of the combats and the level of organisation of the parties at war. Considering that Additional Protocol II was adopted to improve the protection of the civilian population in situations of non international armed conflicts, the Chamber opined that as soon as the requirements for applicability of the Protocol are met, Common Article 3 will apply automatically. The Chamber reviewed the conditions provided for in article 1 (1) of Additional Protocol II and concluded that they were met in the case.³⁴⁵ Concerning the *nexus* that needs to be established between the offences and the armed conflict, the Chamber recalled the position in *Rutaganda* that:

the term *nexus* should not be defined *in abstracto*. Rather, the evidence adduced in support of the charges against the Accused must satisfy the Chamber that such a *nexus* exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt, that, on the basis of the facts, such a *nexus* exists between the crime committed and the armed conflict. This approach finds favour with the Chamber in this instance.³⁴⁶

The Chamber then moved to assess the class of victims, violators and the issue of the territory where violations were allegedly to have been committed as well as the seriousness of the violations.

³⁴² *Musema*, (TC), para 242.

³⁴³ *Akayesu*, (TC), paras 619 – 620.

³⁴⁴ *Rutaganda*, (TC), paras 92 – 93.

³⁴⁵ *Musema*, (TC), paras 253 – 258.

³⁴⁶ *Musema*, (TC), para 262.

The Chamber was satisfied that the defense admitted, based on the testimony of the accused, to the existence of the internal armed conflict.³⁴⁷ The Chamber was also satisfied that the victims of atrocities were protected persons under both article 3 Common to the Geneva Conventions and Additional Protocol II.³⁴⁸ However, the Chamber denied the submissions by the Prosecutor that there existed a *nexus* between Musema's criminal conduct and the armed conflict. Evidence adduced was not sufficient enough to prove that such a *nexus* existed.

The burden rested on the Prosecutor to establish (...) that there existed a *nexus*, on the one hand, between the acts for which *Musema* was individually criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict. In the opinion of the Chamber, the Prosecutor had failed to establish that there was such a *nexus*.³⁴⁹

Musema was therefore not found guilty of violation of Common Article 3 and Additional Protocol II. There were no more developments of this case in relation to the particular matter of article 4 of the Statute. Neither the defense nor the prosecution appealed against the findings of the Trial Chamber on this particular issue. The appeal was lodged against the findings on other charges.

4.1.5. The *Semanza* case

4.1.5.1. Facts

The *Semanza* indictment alleged that “the accused organised, executed, directed and personally participated in attacks, which included killings, serious bodily or mental harm, and sexual violence at four locations in *Bicumbi* and *Gikoro* communes”³⁵⁰, in the prefecture of Kigali Rurale, in the Republic of Rwanda. The facts took place during the month of April 1994. It was alleged that the accused was involved in the attack at *Ruhanga* church, *Musha* church between April 9 and April 20, 1994, at *Mwulire* hill in *Bicumbi* commune and about April 12, 1994 at *Mabale* mosque³⁵¹, and committed serious violations of Common Article 3

³⁴⁷ *Musema*, (TC), paras 970 – 971.

³⁴⁸ *Musema*, (TC), para 972

³⁴⁹ *Musema*, (TC), para 974.

³⁵⁰ *Semanza*, (TC), para 9.

³⁵¹ *Ibidem*

of the Geneva Conventions and Additional Protocol II, as listed in Article 4(a) of the Statute.³⁵²

The indictment also alleged acts of “rape and other forms of indecent assault”³⁵³ punishable under the same provision. During the attack at the *Musha* church, it is further alleged that the accused, with another, “cut off the arm”³⁵⁴ of a man resulting in his death. For this act, the accused was charged with torture and murder.³⁵⁵ Finally “between April 7 and April 30, 1994 in *Gikoro* commune, the accused incited a group (of people) to rape two Tutsi women before killing them.”³⁵⁶ One woman was raped while the other, in addition to rape, died. “For these acts, the accused was charged”³⁵⁷ with rape as a violation of Common Article 3 and Additional protocol II.

4.1.5.2. Applicable law and decision

For the very first time the defense challenged the prosecution on the issue of failing to establish a *nexus* between an internal armed conflict and the death of civilians in the locations alleged in the indictment. In the defense opinion, “the Prosecutor never established the existence of a non international armed conflict in Rwanda.”³⁵⁸ The defense further argued that “the Prosecution never introduced evidence that the alleged crimes that occurred in *Bicumbi* and *Gikoro* had a *nexus* to an internal armed conflict or that the accused would have intended the attacks that occurred in those localities to form part of a non-international armed conflict.”³⁵⁹ Apparently because the parties filed their closing briefs at the same day, the prosecution did not reply to the defense challenge.

Responding to the question whether the conflict in Rwanda was of a non-international character so as to fall within the scope of application of Common Article 3 and Additional Protocol II, the Chamber held:

³⁵² Id.

³⁵³ *Semanza*, (TC), para 9.

³⁵⁴ *Semanza*, (TC), para 10.

³⁵⁵ *ibidem*

³⁵⁶ *Semanza*, (TC), para 12

³⁵⁷ *Ibidem*.

³⁵⁸ Defense Closing Brief, pp 123, 124 and 125, cited as note 54 in *Semanza*, (TC), para 66.

³⁵⁹ Defense Closing Brief, p 12, cited as note 55 in *Semanza*, (TC), para 67.

In general, non-international armed conflicts referred to in Common Article 3 are conflicts with armed forces on either side engaged in hostilities that are, according to the International Committee of the Red Cross, “in many respects similar to an international war, but take place within the confines of a single State.”³⁶⁰

Protocol II does not add more to common Article 3; it rather develops and supplements it without modifying its conditions of application. It is more defined in its material field of application as enshrined in article 1(1) of the Protocol. The Chamber did not characterise the conflict but stated that the “classification of the conflict as one to which Common Article 3 and/or Additional Protocol applies depends on an analysis of the objective factors set out in the respective provisions.”³⁶¹ For the Chamber, the *nexus* “requirement is best understood upon appreciation of the purpose of Common Article 3 and Additional Protocol II.”³⁶² This purpose is “the protection of people as victims of internal armed conflicts, not the protection of people against crimes unrelated to the conflict, however reprehensible such crimes may be.”³⁶³

In adjudicating the facts of this case on this particular issue, the Chamber relied on three major requirements, namely (1) that a non-international armed conflict existed on the territory of the concerned State³⁶⁴; (2) that the victims were not taking part in the hostilities at the time of the alleged violations³⁶⁵; and (3) that a *nexus* existed between the accused’s alleged crimes and the non-international armed conflict.³⁶⁶

In assessing the character of the conflict, the Chamber recalled its previous decision on a motion during the trial. In that decision the Chamber took judicial notice of the fact that “between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character”.³⁶⁷ Regarding the *nexus*, the Chamber opined that the

³⁶⁰ *Semanza*, (TC), para 355.

³⁶¹ *Semanza*, (TC), para 357.

³⁶² *Semanza*, (TC), para 368.

³⁶³ *Ibidem*.

³⁶⁴ *Semanza*, (TC), para 514

³⁶⁵ *Semanza*, (TC), para 515

³⁶⁶ *Semanza*, (TC), para 516

³⁶⁷ *Prosecutor v. Semanza*, Case No. ICTR – 97 – 20 – I, *Decision on the Prosecutor’s Motion for Judicial Notice and Presumption of facts pursuant to Rules 94 and 54*, TC, November 3, 2000, para 48, see Annex II, Part A, para. 3, cited in *Semanza*, (TC), para 281 ,514.

ongoing armed conflict between the Rwandan government armed forces and the RPF, which was identified with the Tutsi ethnic minority in Rwanda; both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians.³⁶⁸

On the specific charges against the accused *Semanza*, the Chamber considered that “the killings began in *Gikoro* and *Bicumbi* shortly after the death of President Habyarimana, when the active hostilities resumed between RPF and government forces. Civilians displaced by the armed conflict as well as those fearing the increasing violence in their localities, who were mostly Tutsi, sought refuge³⁶⁹ at some sites or went into hiding.³⁷⁰ Authorities at all levels including military personnel and civilians “exploited the armed conflict to kill and mistreat Tutsis in *Bicumbi* and *Gikoro*.”³⁷¹ In the opinion of the majority of the Chamber, “the involvement of military officials and personnel in the killings of local Tutsi civilians tied these killings to the broader conflict.”³⁷² The acts of the accused were also related to the conflict by the fact that he “participated in the operations by gathering or bringing militiamen and soldiers to the attacks.”³⁷³ The allegations further state that the accused “also worked in tandem with the soldiers and *Interahamwe* to identify and kill Tutsi civilians.”³⁷⁴

Judge *Ostrovsky* dissented from the majority decision and believed that the *nexus* requirement was not met, or at least was arrived at hastily. *Semanza* was, for the first time in the trial judgments, therefore found guilty, by a majority, of violation of Common Article 3 of the Geneva Conventions and Additional Protocol II. No conviction was entered for these acts, as one of the two judges forming the majority (Judge *Dolenc*), was of the opinion that it “would be impermissible to convict due to the ‘apparent ideal concurrence of the crimes’ with complicity of genocide as charged in Count 3 of the indictment³⁷⁵, and crimes against humanity as charged in Counts 10, 11 and 12 of the indictment.³⁷⁶ In the opinion of the Appeals Chamber, this constituted an error. The Appeals Chamber held:

³⁶⁸ *Semanza*, (TC), para 518.

³⁶⁹ *Ibidem*.

³⁷⁰ *Id.*

³⁷¹ *Semanza*, (TC), para 519.

³⁷² *Semanza*, (TC), para 519.

³⁷³ *Semanza*, (TC), para 520

³⁷⁴ *Ibidem*.

³⁷⁵ *Semanza*, (TC), para 465 and 536

³⁷⁶ *Semanza*, (TC), para 536, 551 – 552 cited in *Semanza v. the Prosecutor*, ICTR – 97 – 20 – A, 2005, para 367. This case is cited as *Semanza*, (AC). It was signed on May 12, 2005 at The Hague, The Netherlands, and

Simultaneous convictions are permissible for war crimes, crimes against humanity and complicity to commit genocide as each has a materially distinct element. The Appellant's conviction for complicity to commit genocide was based on his aiding and abetting principal perpetrators who killed Tutsi because of their ethnicity. As noted earlier, the *mens rea* for complicity in genocide, for those forms of complicity amounting to aiding and abetting, is knowledge of the specific intent of the perpetrator(s). The Appellant's convictions for crimes against humanity necessitated proof of a widespread or systematic attack against a civilian population, whereas convictions for war crimes require that the offences charged be closely related to the armed conflict. In the Trial Chamber's opinion, this nexus was clearly established.³⁷⁷

4.1.5.3. The dissenting opinion of Judge *Ostrovsky*.

In the opinion of the dissenting judge, the fundamental question that was to be answered was "whether the civilians became the victims, not only of genocide and of certain crimes against humanity, but also of the armed conflict."³⁷⁸ He recalled that "Common Article 3 and Additional Protocol II intend to protect the victims of an internal conflict, and not simply to protect all individuals from crimes unrelated to the conflict."³⁷⁹ This distinction pertains to distinguishing violations of human rights from violations of IHL. As seen earlier these two domains are quite different.

Judge *Ostrovsky* quoted from the *Aleksovski* judgment where the Trial Chamber emphasised that "not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law."³⁸⁰ Moreover, he observed that the position of both the ICTR and the ICTY is that:

the *nexus* requirement is met if the alleged offence is 'closely related to the hostilities', or is 'committed in conjunction with the armed conflict', or is 'a part of it.' The wording

issued on the May 20, 2005 at Arusha, Tanzania. The Trial Chamber had sentenced Semanza to 25 years. The Appeals Chamber quashed the sentence and entered a 35 years' imprisonment sentence after reversing the findings of the Trial Chamber to many counts.

³⁷⁷ *Semanza*, (AC), para 369.

³⁷⁸ *Semanza*, (Opinion *Ostrovsky*), para 8.

³⁷⁹ *Semanza*, (Opinion *Ostrovsky*), para 10.

³⁸⁰ *Semanza*, (Opinion *Ostrovsky*), para 12, quoting *Aleksovski*, Judgement, (TC), para. 45.

could be different, but the main criterion is to establish that the offence is committed as a result of a violation of the laws or customs of war during an internal armed conflict. This is the real meaning of the term '*nexus*'.³⁸¹

In the opinion of the dissenting judge, “instead of proving the existence of a *nexus* between the accused’s crimes committed at the three sites and the armed conflict, the Prosecutor as well as the majority oversimplified the matter. They interpreted the war and its influence on the criminal situation in the country as the requisite *nexus*.”³⁸² Judge Ostrovsky finally observed that “the majority overlooked this deficiency in the indictment by stating that: [t]he Chamber understands this phrase as meaning that the alleged crimes had a *nexus* to the armed conflict’. The majority’s observation and the Prosecutor’s approach revealed that they were not accurately applying the requisite legal standard.”³⁸³

4.1.6. The *Kamuhanda* case

4.1.6.1. Facts

The accused was “charged with the war crimes of serious violations of Common Article 3 and Additional Protocol II: for outrages upon personal dignity (Count 8) and killing and causing violence (Count 9).”³⁸⁴ Kamuhanda was both prosecuted as an author of the crimes and as a superior of the perpetrators.³⁸⁵ The facts of the case are so general and so complex that it is not possible to pinpoint them in the realm of Common article 3, Additional Protocol II or article 4 of the ICTR Statute.

Whereas it does not clearly appear in the indictment, the Trial Chamber found as a fact that “on the basis of evidence presented during trial that, at the time of the events alleged in the indictment, the accused distributed weapons to members of the *Interahamwe* and others engaged in the attacks in *Gikomero* and that the accused himself participated in the crimes against the Tutsi population at *Gikomero* on 12 April 1994.”³⁸⁶ These facts do not warrant the

³⁸¹ *Semanza*, (Opinion Ostrovsky), para 14.

³⁸² *Semanza*, (Opinion Ostrovsky), para 38.

³⁸³ *Semanza*, (Opinion Ostrovsky), para 47 referring to paragraph 516 of the judgment

³⁸⁴ *Kamuhanda*, (TC), para 20.

³⁸⁵ *ibidem*

³⁸⁶ *Kamuhanda*, (TC), para 740.

charge under article 4 of the Statute. Distributing weapons is not provided for in either of the instruments referred to, neither is “crimes against Tutsi population” unless it is specified which acts the accused actually committed.

A reading of the chamber’s conclusion reveals that the prosecution relied “in part on the same facts which support the Chamber’s findings regarding genocide and extermination as a crime against humanity to attempt to demonstrate the existence of a nexus between the alleged actions of the Accused and the conflict in Rwanda in 1994.”³⁸⁷ It is important to recall that the motivation for finding a relation between genocide and crimes against humanity is not sufficient to constitute a material element for a finding in regard to serious violations of Common Article 3 to the Geneva Conventions and Additional protocol II. Both domains are very distinguishable. Yet this conclusion of the Chamber does not illuminate on specific facts allegedly posed by the accused.

4.1.6.2. Applicable law and decision

One of the conditions for the application of article 4 of the Statute is the existence of a non-international armed conflict. For the sole purpose of this case, the parties agreed that at all relevant times covered by the indictment, a state of non-international armed conflict existed in Rwanda.³⁸⁸ In its judgment, however, the Chamber clearly departed from the “agent test” as relied upon in *Akayesu*. The Trial Chamber agreed with the Appeals Chamber in *Akayesu* that there was no mention of a possible delimitation of class of persons likely to be prosecuted under article 4 of the Statute.³⁸⁹ Moreover, “common Article 3 and Additional Protocol II do not specify classes of potential perpetrators but rather indicate who are bound by the obligations imposed by their provisions to protect victims and potential victims of armed conflicts.”³⁹⁰ What is much at issue is the punishment “of perpetrators, whoever they may be”.³⁹¹ There is no requirement that a link might exist “between the perpetrator and one

³⁸⁷ *Kamuhanda*, (TC), para 741.

³⁸⁸ *Defense response to Prosecutor’s Request to Admit Facts*, filed on April 24, 2001, Fact number 90, cited in *Kamuhanda*, (TC), paras 240 – 242.

³⁸⁹ *Akayesu*, (AC), para 435.

³⁹⁰ *Kamuhanda*, (TC), para 726.

³⁹¹ *Kamuhanda*, (TC), para 727.

of the parties to the conflict³⁹² as was the case in *Kayishema* and *Ruzindana* case. In assessing the existence of a *nexus* between the alleged violation and the armed conflict, the Chamber relied on the Appeals Chamber's decision in *Rutaganda* case.

After reviewing the evidence before it, the Chamber concluded that such evidence, in the present case, was insufficient for a finding that there was a *nexus* between any crimes committed by the accused³⁹³ and the armed conflict. The chamber did not discuss the other elements of the other crimes charged.³⁹⁴ Kamuhanda was found not guilty of serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.³⁹⁵ The chamber theoretically and practically assessed the following conditions:

- a. The existence of a non-international armed conflict.³⁹⁶
- b. The protected persons³⁹⁷, as well as
- c. The *nexus* between the alleged violations and the armed conflict.

The chamber did not assess any other conditions. In its findings, however, the Chamber erred in holding that for the accused to incur individual criminal responsibility under Article 4 of the Statute, it is incumbent on the Prosecution to prove beyond reasonable doubt

- a. That the accused committed the alleged underlying crime or crimes,
- b. Against persons not taking an active part in the hostilities,
- c. That the alleged act or acts were committed in the context of an internal armed conflict, and
- d. That there existed a *nexus* between the alleged acts and the armed conflict.³⁹⁸

The first condition here is not among the ones that are required for application of Article 3 or Additional Protocol II. Specific crimes committed (i.e. murder, torture, etc.) are looked at only when all the conditions for applicability of Common Article 3 and Additional Protocol

³⁹² *Kamuhanda*, (TC), para 728.

³⁹³ *Kamuhanda*, (TC), para 743.

³⁹⁴ outrages upon personal dignity, in particular humiliating and degrading treatment, rape and indecent assault, as part of an armed internal conflict, killing and causing violence to health and to the physical or mental well-being of civilians as part of an armed internal conflict; *Kamuhanda*, (TC), paras 744 – 747.

³⁹⁵ *Kamuhanda*, (TC), para 748.

³⁹⁶ *Kamuhanda*, (TC), para 738.

³⁹⁷ *Kamuhanda*, (TC), para 737.

³⁹⁸ *Kamuhanda*, (TC), para 737.

II are fulfilled. It is in fact the first time a chamber of the ICTR elevated the underlying offences to the level of required conditions.

4.1.7 The *Imanishimwe* case³⁹⁹

4.1.7.1 Facts

The amended indictment of October 9, 1997 charged Lieutenant Samuel Imanishimwe with violations of Common Article 3 and Additional Protocol II under article 4(a) of the Statute (count 13 of the indictment). The facts of the case were not clearly stated. The prosecution relied on nine paragraphs⁴⁰⁰ of the indictment which, to a large extent, are broader and do not spell out which particular facts Imanishimwe, as the principal author, actually committed or allowed to be committed by his subordinates. It is alleged that Imanishimwe

- a. “participated in preparation of lists of people to eliminate, mostly Tutsi and some Hutu of the political opposition”;⁴⁰¹
- b. those “lists were given to the soldiers and militiamen with orders to arrest and kill the persons whose names were listed. The soldiers and the *Interahamwe* then carried out the orders”;⁴⁰²
- c. *Imanishimwe* gave “orders to execute refugees arrested on or about 11 April 1994, wherein his military camp”;⁴⁰³
- d. “on or about 15 April 1994, Imanishimwe and co-accused Emmanuel *Bagambiki*, ordered refugees to move from the *Cyangugu* Cathedral to the *Cyangugu* Stadium. Those who refused to obey were threatened with death”;⁴⁰⁴

³⁹⁹ *Imanishimwe* case is a joint trial of three accused, namely André *Ntagerura*, Emmanuel *Bagambiki* and Samuel *Imanishimwe*. The case has been referred to throughout this work as *Cyangugu* case. On October 11, 1999, the Tribunal granted the Prosecutor’s motion for joinder of *Ntagerura* with Emmanuel *Bagambiki*, Samuel *Imanishimwe*, and Yussuf *Munyakazi*; *Prosecutor v. Ntagerura*, Case No. ICTR-96-10-I, *Prosecutor v. Bagambiki, Imanishimwe, and Munyakazi*, Case No. ICTR-97-36-I, *Decision on the Prosecutor’s Motion for Joinder*, (TC), October 11, 1999. Appeal of this decision was rejected; *See Bagambiki v. Prosecutor*, Case No. ICTR-96-10-A and ICTR-97-36-A, Decision (AC), April 13, 2000; *Bagambiki v. Prosecutor*, Case No. ICTR-96-10-A and ICTR-97-36-A, Decision (AC), September 7, 2000. Yussuf *Munyakazi*, the other accused was arrested while the case against the three others was awaiting the Trial Chamber decision.

⁴⁰⁰ Those paragraphs are 3.17, 3.18, 3.20, 3.21, 3.22, 3.23, 3.24, 3.25 and 3.30.

⁴⁰¹ Para 3.17 of the amended indictment of October 9, 1997.

⁴⁰² Para 3.18 of the same indictment

⁴⁰³ Para 3.20 of the indictment

⁴⁰⁴ Para 3.21 of the indictment

- e. “refugees were executed by *gendarmes* and *Interahamwe* who were outside the stadium where many other refugees gathered”;⁴⁰⁵
- f. “on several occasions between April and June 1994, refugees were executed in a place called *Gatandara*. The accused also ordered soldiers to execute certain persons suspected of being Tutsis”;⁴⁰⁶
- g. “between April and July 1994, the accused and his soldiers participated in the selection and arrest of Tutsis, some of whom were later executed at the Cyangugu barracks”;⁴⁰⁷
- h. “between April and July 1994, Tutsis and moderate Hutus were arrested and taken to the *Cyangugu* Barracks to be tortured and executed. Soldiers during the same period participated on several occasions in massacres of the civilian Tutsi population”;⁴⁰⁸
- i. “during the events referred to in the indictment, *Interahamwe* with the help of soldiers participated in the massacres of the Tutsi civilian population and Hutu political opponents in *Cyangugu* prefecture.”⁴⁰⁹

Accusations against Lieutenant *Imanishimwe* were expressed in general terms and did not allege any specific fact. These charges, as the Chamber observed, “were unacceptably vague.”⁴¹⁰ Notwithstanding this fact, the Chamber held that it would consider the evidence against the accused “to see if such strong evidence existed”.⁴¹¹ Consequently, “if strong evidence of guilt was found to exist, the Chamber would take into consideration to what extent the lack of notice and the ambiguity influenced and would adjust its finding if necessary.”⁴¹² It is in pursuance to this line of reasoning that serious violations of Common Article 3 and Additional Protocol II were analysed in this case.

⁴⁰⁵ Para 3.22 of the indictment

⁴⁰⁶ Para 3.23 of the indictment

⁴⁰⁷ Para 3.24 of the indictment

⁴⁰⁸ Para 3.25 of the indictment

⁴⁰⁹ Para 3.30 of the indictment

⁴¹⁰ *Cyangugu* case, (TC), para 64.

⁴¹¹ *Cyangugu* case, (TC), para 68, note that the past tense ‘existed’ is used in the quote instead of ‘exists’.

⁴¹² *Cyangugu* case, (TC), para 68. (also the past tense is used for the purpose of quotation). It is worthy to note that the question of defects in the indictments against the co-Accused André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe brought about the dissent of Judge Dolenc on this issue. In dissenting he stated among other things that:

In taking this position, I am aware that the practical result of my opinion is that many of the charges in the Ntagerura and Bagambiki/Imanishimwe Indictments are so materially defective that they should be dismissed without any further consideration of the evidence. One may consider that this result runs contrary to the interests of international justice. However, I strongly believe that the ultimate interest of

In relation to a) and b) above, the Chamber found that *Imanishimwe* and co-accused *Bagambiki* “received names of people with suspected ties to the RPF from assailants who were threatening to attack *Kamarampaka* stadium”⁴¹³ and “discussed these names with other members of the prefectural security council and then removed sixteen Tutsis and one Hutu, who was a local leader of a political opposition party, from *Kamarampaka* Stadium and *Cyangugu* Cathedral on 16 April 1994.”⁴¹⁴ It nevertheless concluded that it lacked “sufficient evidence to determine whether *Imanishimwe* participated in the preparation of lists of names for the purpose of eliminating the identified individuals or whether he gave such lists to *Interahamwe*.”⁴¹⁵ Yet this finding was unnecessary in regard to facts constituting serious violations of Common Article 3 and Additional Protocol II because it does not fit in the provision of Article 4(a) of the Statute.

With regard to item in c) above, the Chamber found that seven civilians were arrested and brought by soldiers to their camp where they were presented to *Imanishimwe*, accusing them of being the accomplices of the enemy.⁴¹⁶ While in the military camp,

the soldiers repeatedly kicked and beat the refugees, including with the butts of their rifles, from the time of their arrest and through their incarceration at the camp. *Imanishimwe* was present during a part of the beatings, but he did not attempt to stop them. During their incarceration at the camp, soldiers beat the detainees again with wooden sticks and rifle butts while threatening to beat them to death.⁴¹⁷

Probably this might constitute a material element for a finding of torture if other elements of that crime are met.

No factual finding implicating *Imanishimwe* was arrived at in relation to item in (d) above. The Chamber, having heard evidence of an incident which took place on June 6, 1994 in the

international justice, the universal application of the rule of law, may be achieved only by respecting the basic rights of an Accused to a fair trial and due process. Even when trying cases involving the most serious crimes, the Tribunal is responsible for ensuring a fair trial.

Cyangugu case, *Separate and dissenting opinion of Judge Dolenc*, February 25, 2004, para 3.

⁴¹³ *Cyangugu* case, (TC), para 785

⁴¹⁴ *Ibidem*

⁴¹⁵ *Id.*

⁴¹⁶ *Cyangugu* case, (TC), para 786.

⁴¹⁷ *ibidem*

Kamembe city market within the *Cyangugu* prefecture, concluded that soldiers arrested civilians in the market and took them to the camp. Once in the barracks, the civilians were beaten. Soldiers hammered a nail into the foot of one detainee, “removed the nail and hammered it into the foot of another detainee.”⁴¹⁸ It was alleged that this incident happened in the presence of *Imanishimwe* who apparently “did nothing to stop or restrain the soldiers during the mistreatment of those detainees”.⁴¹⁹ This can also amount to an act of torture but as earlier indicated, it does not appear in the indictment. The Chamber also found that soldiers in the camp killed or facilitated the killing of four persons.⁴²⁰ From the foregoing, the Chamber “inferred that *Imanishimwe*, as the commander of the camp, issued orders to soldiers authorizing the arrest, detention, mistreatment, and execution of civilians with suspected ties to the RPF.”⁴²¹

In relation to the item in i), the Chamber found “that soldiers participated in the massacre of mainly Tutsi civilian refugees at (a) football field on April 12, 1994.”⁴²²

The Chamber concluded that acts of murder, torture and cruel treatment, all under article 4(a) of the Statute, were committed by soldiers under *Imanishimwe* command.⁴²³ There was a dissenting opinion as regard the acts of the football field due to the fact that this incident was not contained in the indictment.⁴²⁴

4.1.7.2. Applicable law and decision.

The Trial Chamber in this case emphasised its understanding of torture and cruel treatment. The Chamber held that “torture” has the same essential elements as those set forth for torture as a crime against humanity, which was also the Chamber’s position in the *Semanza* case.⁴²⁵ The Chamber also accepted the jurisprudential⁴²⁶ definition of “cruel treatment” as an

⁴¹⁸ *Cyangugu* case, (TC), para 789

⁴¹⁹ *Ibidem*

⁴²⁰ *Cyangugu* case, (TC), para 790.

⁴²¹ *Ibidem*

⁴²² *Cyangugu* case, (TC), para 791.

⁴²³ *Cyangugu* case, (TC), para 794 – 801.

⁴²⁴ *Cyangugu* case, (TC), para 803; see also *Separate and dissenting opinion of Judge Dolenc*.

⁴²⁵ *Cyangugu* case, (TC), para 765, *Semanza*, (TC), para 374.

⁴²⁶ The following cases were cited to support the definition: *Celebici*, Judgment (AC), para 424; *Naletic and Martinovic*, Judgment (TC), para 246; *Blaskic*, Judgment (TC), para 186; *Jelusic*, Judgment (TC), para 41;

intentional act of omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. Recalling its judgment in the *Semanza* case, Trial Chamber III was of the view that

in connection with crimes within the scope of Article 4 of the Statute, the Prosecutor must prove, at the threshold, the following elements: (1) the existence of a non-international armed conflict on the territory of the concerned State; (2) the existence of a nexus between the alleged violation and the armed conflict; and (3) the victims were not directly taking part in the hostilities at the time of the alleged violation.⁴²⁷

In this case the Chamber simply, pursuant to a motion during the Trial, took a judicial notice that “between 1st January and 17th July 1994, in Rwanda, there was an armed conflict not of an international character”.⁴²⁸

With regard to the *nexus*, the Chamber held that:

The evidence shows that, on 6 June 1994, soldiers arrested witness MG and three other members of his family because of their suspected ties to RPF. Moreover, when soldiers subsequently beat and otherwise mistreated witness MG and his co-detainees at the military camp, they questioned them concerning whether they were members of the RPF and accused them of collaborating with the enemy. Similarly, on 11 April 1994, soldiers presented witness LI and other refugees brought with him to Imanishimwe as “*Inyenzi – Inkotanyi*”, a reference to those associated with the RPF. The Chamber finds that the soldiers’ actions were motivated by their search for enemy combatants and those associated with them or, at least, that their actions were carried out under the pretext of such a search. As such, the Chamber considers that the soldiers were acting in furtherance of the armed conflict or under its guise. Likewise, the Chamber considers that when the soldiers took part in the massacres of refugees at the Gashirabwoba football field on 12 April 1994, they did so under the guise of the underlying armed conflict. This is sufficient to establish that the alleged violations of Article 4 had the requisite nexus to the armed conflict.⁴²⁹

Celebici, Judgment (TC), par 552, *Tadic*, Judgment (TC), paras 723 – 726; all cases cited at note 1659 of the *Cyangugu* case.

⁴²⁷ *Cyangugu* case, (TC), para 766.

⁴²⁸ *Cyangugu* case, (TC), para 767 citing its earlier decision, *Prosecution v. Ntagerura, Bagambiki and Imanishimwe*, ICTR – 99 – 46 – T, *Oral Decision on the Proposed Expert reports and evidence of Antoine Nyetera, Uwe Friesecke, and Wayne Madsen*, (TC), Transcript of proceedings, July 4, 2002, p. 9.

⁴²⁹ *Cyangugu* case, (TC), para 793.

This finding may suggest an attempt to conclude to the existence of a *nexus* between the soldiers' actions and the armed conflict. The Chamber finally found that the victims were protected persons under Common Article 3 and Additional Protocol II. Trial Chamber III held that:

Upon considering the evidence relevant to Count 13 of the indictment against Imanishimwe, the Chamber finds beyond reasonable doubt that the victims, mainly Tutsi refugees gathered at various sites in Cyangugu and other Tutsi civilians in the prefecture, were not taking a direct part in the non-international armed conflict in Rwanda at the time they suffered the alleged violations of Article 4(a) of the Statute⁴³⁰.

Regarding the events which took place at the Gashirabwoba football field and which constituted the reason for the above finding, it must be recalled that the chamber relied on the testimony of only one prosecution witness, namely witness LAC⁴³¹. This witness recounted no more than three encounters with soldiers at the *Gashirabwoba* football field. He talked of the soldiers arriving at the football field in three pick-ups on April 11, 1994 and left with one man. He also alleged that the soldiers returned at about 07 p.m. and asked refugees if all were Tutsi. The refugees replied that there were also Hutu.⁴³² Apparently, the soldiers wanted to kill the refugees but one man near the driver refused and they left. Finally, LAC alleged that 15 soldiers fired guns and threw grenades at the refugees on April 12, 1994 while others were hiding in the bushes.⁴³³ In all these encounters, there is nothing to suggest the idea of any armed struggle. It is rather recounted that refugees were fighting attackers from the neighbourhood. The question is, therefore, whether only the presence of the so-called soldiers and the action of firing and throwing grenades immediately gives rise to the conclusion of an armed conflict taking place at the football field. The Chamber did not establish any relationship between the conflicts in other areas of the country with the event at the Gashirabwoba football field. There is no other evidence to suggest that combat took place in that area. Whereas at the military camp, the Chamber relied on testimonies of witnesses who apparently were mistreated by soldiers accusing them of having ties with RPF, but at

⁴³⁰ *Cyangugu Case*, (TC), para 792.

⁴³¹ *Cyangugu Case*, (TC), paras 414 - 419.

⁴³² *Cyangugu Case*, (TC), para 416.

⁴³³ *Cyangugu Case*, (TC), para 418.

this place of Gashirabwoba, there was nothing of the kind. It is a questionable conclusion of the Chamber.

Sub-chapter 2: The doctrine of judicial notice

The doctrine of judicial notice was relied on by the Trial Chamber in characterising the nature of the conflict in Rwanda. This was the case in *Akayesu*⁴³⁴, *Semanza*⁴³⁵, *Imanishimwe*⁴³⁶ and *Kajelijeli*⁴³⁷ cases. Legal consequences derive from characterising an armed conflict as either internal or international.⁴³⁸ It is therefore appropriate to look at this doctrine in the realm of the jurisprudence of the ICTR.

This doctrine was applied by the ICTR because it is provided for in Rule 94 that reads as follows:

Rule 94: Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Pursuant to this rule, a Trial Chamber may take judicial notice of three types of evidence. Judicial notice is a rule of judicial convenience which is known in virtually all common Law jurisdictions. In civil law criminal systems, on the other hand, the concept of judicial notice does not exist.⁴³⁹ O’Sullivan notes that taking judicial notice is an exception to the general rule that all facts in issue or relevant to the issue in a given case must be proved by

⁴³⁴ *Akayesu*, (TC), para 165.

⁴³⁵ *Semanza*, (TC), May 15, 2003.

⁴³⁶ Cyangu case, *Oral decision*, July 4, 2002. p 3.

⁴³⁷ *Kajelijeli*, (TC), para 744.

⁴³⁸ Prosecutor v. Tadic, *Separate and dissenting Opinion of Judge McDonald regarding the Applicability of Article 2 of the Statute*, appended to Judgment, Case No. IT-94-1-T, May 7, 1997, cited by Bennouna M, “The Characterisation of the Armed Conflict in the Practice of the ICTY”, in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague – London – Boston, 2001, pp 55 – 64, at p 55.

⁴³⁹ O’Sullivan E., Judicial Notice, in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, op. cit., pp329 – 339, at p. 329.

evidence.⁴⁴⁰ Facts that can be judicially noticed are the ones that are notorious or known to everyone, like international boundaries, locations of cities, rivers, lakes, and the normal period of gestation.⁴⁴¹ Furthermore a court can take judicial notice of facts after inquiry. But here it must be noted that even these kinds of facts may be at the heart of litigation and disputed by the parties, in which case, judicial notice cannot be taken of the facts.⁴⁴²

Section 451(f) of the *California Evidence Code* mandates judicial notice of facts and propositions of generalised knowledge that are so universally known that they cannot reasonably be the subject of dispute. Section 452(f) permits judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy⁴⁴³. Matters to be judicially noticed should be so notorious, or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary.⁴⁴⁴

Judicial notice is not to be used to resolve the disputed issues of a case, but rather is a way of avoiding wasting time and expense in the proof of matters that are so obvious and indisputable as to necessitate no proof. But the hazards of judicial notice are illustrated by the ease with which judges might at one time have taken judicial notice to the great detriment of pioneering searchers for truth that the earth is flat, that humanity has existed for only a few thousand years, or that witches commonly cause the failure of crops and the drying of cows. Examples of this kind demonstrate that a debated issue, though most of the population stands on one side and only a tiny minority on the other, should not be resolved by judicial notice⁴⁴⁵.

The doctrine of judicial notice was adopted as a judicial shortcut to avoid the necessity for the formal introduction of evidence in certain cases where there is no real need for such

⁴⁴⁰ O'Sullivan E., *Ibidem*, p 331.

⁴⁴¹ *The Law of Evidence in Canada*, cited by O'Sullivan, *op. cit.*, p 332.

⁴⁴² *Id.* p 332.

⁴⁴³ Institute for Historical Review, *Journal of Historical Review*, "Judicial Notice of the Holocaust", Spring 1982, Volume 3, Number 1, p 47, also at http://www.ihr.org/jhr/v03/v03p-47_Staff.html.

⁴⁴⁴ Archbold 2002, *Criminal Pleading, evidence and practice*, Sweet & Maxwell, London, 2002, paras 10-17, p 1219.

⁴⁴⁵ Institute for Historical Review, p 48.

evidence. Before a court will take judicial notice of any fact, however, that fact must be a matter of common and general knowledge well established and authoritatively settled, not doubtful or uncertain⁴⁴⁶. The sole fact that a party to a trial denies an event is sufficient to prevent a court from taking a judicial notice of that event. On the contrary, if the parties agree on all or some facts, those ones should be noticed. In *Kvocka and others*⁴⁴⁷ the parties had agreed to a large number of adjudicated facts from prior cases before the ICTY. The agreement by the parties amounted to admissions by the parties or a statement of matters which were not in dispute. Once the parties had agreed to certain facts contained in prior judgements of the tribunal, nothing precluded the Trial chamber from drawing legal conclusions based on those facts.⁴⁴⁸

There are two reasons to take judicial notice: the expedition of proceedings and the uniformity of decisions on certain matters. Taking judicial notice of facts must be consistent with procedural fairness. In the context of criminal proceedings, this means that if the accused is adversely affected, he must be given the chance to challenge the facts which are to be noticed.⁴⁴⁹

The fundamental question that needs to be asked is whether the nature of the conflict in Rwanda was a matter of fact or one of law. The reason for this question is that judicial notice is taken for only matters of fact. At common law, when a court takes judicial notice of a fact, it finds that the fact exists although its existence has not been established by evidence.⁴⁵⁰ In

⁴⁴⁶ *Communist Party of the United States of America v. Peek*, 20 C. 2d 536, 546 (Superior Court of Los Angeles County, 1942). In this case, the issue was whether the Court should take judicial notice of the assertion that the Communist Party advocates force and violence. The court refused to take judicial notice, pointing with approval to the Washington Supreme Court's refusal to take judicial notice of the same "fact for the reason that the litigants denied it". 20 C. 2d 547, citing *State v. Reeves*, 106 P. 2d 729. the Superior Court of Los Angeles strongly implied that the denial of an alleged fact by a party to a lawsuit was alone sufficient to persuade a court not to take judicial notice of the alleged fact. 20 C. 2d 548. In further support of its holding, the Court said at 546 – 547: "as was pointed out in *Varcoe v. Lee*, 180 Cal. 338, 344 (181 Pac.223), "if there were any possibility of dispute," the fact cannot be judicially noticed.

⁴⁴⁷ *The Prosecutor v. Kvocka and Others, Prosecutor's Motion for Judicial Notice of Adjudicated Facts*, Case No IT-98-30-PT, January 11, 1999; *Prosecutor v. Kvocka and Others, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts*, Case No. IT-98-30-PT, March 19, 1999.

⁴⁴⁸ O'Sullivan, op. cit., p 337.

⁴⁴⁹ O'Sullivan, op. cit., p 332.

⁴⁵⁰ Archbold, *Criminal Pleading, Evidence and Practice*, London Sweet & Maxwell, 2004, par 10-71, p 1289.

*Simic and Others*⁴⁵¹, a Trial Chamber of the ICTY denied a motion requesting it to take judicial notice of the international conflict in the former Yugoslavia. In this case the prosecution requested the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia and Herzegovina either as a fact of common knowledge pursuant to Rule 94 (A)⁴⁵² of the ICTY Rules of Procedure and Evidence, or under Rule 94 (B) as an adjudicated fact. The Chamber considered *inter alia* that it could only take judicial notice of factual findings but not of a legal characterisation based on such facts. Apart from the assessment of the facts at issue, the essential legal question that needed to be resolved was that of the criteria the ICTY should apply in characterising a conflict as either international or internal. The Trial Chamber rejected the submission under Rule 94 (A) that the international character of the conflict in Bosnia and Herzegovina was a fact of common knowledge, as an historical fact of common knowledge or that it was a fact of common knowledge within the Tribunal, simply because the jurisprudence of the ICTY had found an international armed conflict to exist as a matter of fact in other cases.⁴⁵³

Notwithstanding this position, it was also sustained that from a legal standpoint, some harmonisation was necessary to ensure that each Trial Chamber employs the same criteria when characterising the conflicts in the former Yugoslavia.⁴⁵⁴ Furthermore, if the tribunal determines each case separately, it will have to reconsider the same issue several times, thus risking inconsistencies and wasting judicial resources. It was suggested an innovative approach that the tribunal could hold a non-adversarial hearing, either before one of the Trial Chamber or *en banc*, to hear evidence presented by the Prosecutor and *amici curiae* briefs on the characterisation of the entire conflict.⁴⁵⁵

⁴⁵¹ *Prosecutor v. Blagoje Simic, Miran Simic, Miroslav Tadic, Stevan Torodovic and Simo Zaric*, Decision on the pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia – Herzegovina, Case No IT – 95 – 9 – T, March 25, 1999.

⁴⁵² Rule 94 of the Rules of Procedure and Evidence of the ICTY is relatively the same as Rule 94 of the Rules of ICTR.

⁴⁵³ O’Sullivan, op. cit., p 335.

⁴⁵⁴ Bennouna M, op. cit. p 58.

⁴⁵⁵ Bassiouni M C, (1996), *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, INC., Irvington-on-Hudson, New York, p 444.

The ICTR on its side did not give chance for arguments before taking judicial notice. It took for granted the fact that because Additional Protocol II was added to the subject matter jurisdiction of the Tribunal, it therefore followed that the conflict was deemed internal. However, the attainment of this material condition was a matter of law. In the cases before the ICTY, the characterisation of the conflict was discussed at length.

In summary it is stressed that where a Trial Chamber takes judicial notice of certain facts and does not decide upon the legal characterisation of those facts, the parties to the proceedings must determine whether further evidence must be adduced in order to establish the point which is suggested or inferred by the judicially noticed facts.⁴⁵⁶ What needs to be born in mind is the factual character of a judicial notice which must not hamper the legal character. A legal characterisation by the judges must always be substantiated by the facts after arguments between the parties.

Sub-Chapter 3: Assessment of the ICTR jurisprudence

It is not an easy task to assess the jurisprudence of the ICTR in its approach to Common Article 3 and Additional Protocol II. The way the Trial Chambers of the ICTR interpreted the legal requirements set forth for the application of these international instruments, largely differs. In some instances, all the requirements were not assessed or were partly assessed. The better way to do an assessment of the jurisprudence would be to look at every single requirement for the applicability of Article 4 of the Statute. In this paper, the major requirements are analysed, namely the character or the nature of the conflict and the *nexus* between the reprehensible conducts and the armed conflict. The ICTR also relied on judicial notice taking the conflict in Rwanda as a settled matter that did not need any further discussion. Once again, the doctrine of judicial notice was not fully applied as will be seen below.

⁴⁵⁶ O'Sullivan, op. cit., p 338.

4.3.1 The nature of the conflict in Rwanda.

Evidence was presented to the Chamber to show the nature of the war and the role of the Republic of Uganda, which was not even denied by President *Museveni*⁴⁵⁷. Ugandan officials did not deny the origin of the attack. They instead labelled it an action by deserters from the NRA. However, other Ugandans, notably ex-president Godfrey *Binaisa*, poured scorn upon the official version. The ex-president said:

We are further told by Ugandan government that these returnees had already deserted from the Ugandan army. How many were ever captured? What was the result of the trials? Did the Tutsi commissioned officers in the Ugandan army ever take oath of allegiance to Uganda when they were appointed? Why is it that the present rebel commander Major-General Paul Kagame formerly chief of army intelligence in the Ugandan army keeps on moving in and out of Uganda without fear of arrest? Only one conclusion remains to be drawn, that the present conflict was started by Uganda, and it would be a fiction to call it a civil war. For instance, the American Civil War did not start in Canada or Mexico but right here in the United States.⁴⁵⁸

Expert witnesses Dr. *Alison Desforges*, Pr. *Filip Reyntjens* and Pr. *André Guichaoua* as well as all the UN Reports, the Report of Eminent Personalities together with eyewitnesses' accounts of the events, provide objective evidence which could have brought the Chambers to make a finding on the international nature of the conflict. Instead, the ICTR analysed this matter in a biased manner. The Tribunal, in the wording of the *Journal of Historic Review*, makes itself a part of a movement to institutionalise and transform into sacrosanct dogma a version of history which a growing number of other people sincerely and seriously dispute⁴⁵⁹.

⁴⁵⁷ See for instance "We were forced into Congo", *The New Vision*, Thursday, September 17, 1998, particularly "earlier on, I was telling you that our involvement in the Great Lakes Region started with Rwanda. You remember 4,000 young Rwandan who had been part of our Army again contrary to my advice, escaped and attacked the late Habyarimana Government. ... Some people talk of internal affairs of sovereign States when it suits their greed. I would like, however, to clarify one point. Internal affairs, which should not be interfered with, do not and cannot include the right to commit genocide".

⁴⁵⁸ Crawford B, "Rwanda: Myth and reality", citing Godfrey *Binaisa*, *Open letter to the youth of Uganda*, June 8, 1994. The article was taken from <http://www.africa2000.com/INDX/rwanda.htm>, which was last modified on December 11, 1996, accessed on June 11, 2005.

⁴⁵⁹ Institute for Historical Review, p 47, available at <http://www.ihr.org./jhr/v03p-43 Staff.html>.

In the *Akayesu* case, the Chamber relied on evidence presented by Major General *Romeo Dallaire* as well as Dr. *Alison Desforges* and some Reports of the UN⁴⁶⁰. However, the Chamber assessed only one side of the evidence presented before it. Had it impartially and fully assessed all the evidence brought by these witnesses or contained in these reports, it should have concluded that the conflict was international or at least it would have given arguments why it would decline to arrive at such a conclusion! The Chamber was of the opinion that despite the abundant evidence to the contrary, it would not indulge into the characterisation of the conflict.

This uncommon approach is also entertained where the Chamber concluded that it “has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment”.⁴⁶¹ This is a misconception of the concept of reasonable doubt where it appears that a Chamber arrived at a conclusion by preventing any other argument to the contrary. In determining whether or not the Prosecutor has proven the defendant's guilt beyond a reasonable doubt, a judge should be guided solely by a full and fair evaluation of the evidence. After carefully evaluating the evidence, the judges must decide whether or not that evidence convinces them beyond a reasonable doubt of the defendant's guilt. Whatever the verdict may be, it must not rest upon baseless speculations. Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to deliberations or to avoid an unpleasant duty.

In the *Kayishema* and *Ruzindana* cases, the Chamber referred to the character of the armed conflict in only two paragraphs. It first held that:

all material requirements existed to consider the situation in Rwanda, during April, May, June and July 1994, as an armed conflict, not of an international character. This conflict took place in the territory of Rwanda between governmental armed forces (Forces Armées Rwandaises – the FAR) and the dissident armed forces (Rwandan Patriotic Front – the RPF). These dissidents, under the responsible command of General Kagame, exercised control over part of the territory of

⁴⁶⁰ See for illustration *Akayesu*, (TC), paras 163 - 165 and para 627

⁴⁶¹ *Akayesu*, (TC), para 639.

Rwanda and were able to carry out sustained and concerted military operations as well as to implement Common Article 3 and Protocol II.⁴⁶²

Nowhere in the judgment did the Chamber clearly demonstrate which those material requirements were. The Chamber did not refer to any evidence adduced by the prosecution to sustain the conclusion arrived at in the legal findings that:

this is not a question that needs (to) be addressed. It has been established, beyond a reasonable doubt, that there was an armed conflict, not of an international character, in Rwanda. This armed conflict took place between the governmental armed forces, the FAR, and the dissident armed forces, the RPF, in the time of the events alleged in the Indictment that is from April to July 1994.⁴⁶³

There is nowhere in the judgment one can find factual evidence to prove the non – international character of the conflict. The only conclusion that can be drawn is that either the Chamber assumed the character of the conflict, misconceived its conclusion or at the worst, it preconceived it.

In the *Rutaganda*⁴⁶⁴ case the Trial Chamber also concluded on the basis of evidence presented by three expert witnesses⁴⁶⁵ that it was satisfied that at the time of the events alleged in the indictment, namely, in April, May and June 1994, there existed an internal armed conflict between, on the one hand, the government forces and, on the other, the dissident armed forces, the RPF. The RPF was not a dissident force because, initially, it did not belong to the Rwandan army; it was a completely foreign armed force. Like in the *Kayishema* and *Ruzindana* case, the legal finding is not supported by the facts.

Professor *Filip Reyntjens* was relied upon to prove allegations contained in paragraph seven of the indictment which alleged the existence of a state of internal armed conflict. But looking at the substance of his testimony to sustain this contention, the findings relate instead to the existence of a multiparty system in Rwanda; what the expert called a period of political

⁴⁶² *Kayishema* and *Ruzindana*, (TC), para 172.

⁴⁶³ *Kayishema* and *Ruzindana*, (TC), para 597.

⁴⁶⁴ See *Rutaganda*, (TC), para 436.

⁴⁶⁵ *Rutaganda*, (TC), paras 378 – 381.

turmoil.⁴⁶⁶ *Reyntjens*, as well as some eyewitnesses, said that after the death of the President, roadblocks were erected in and around Kigali and later extended to the rest of the country to prevent the RPF penetration, and that one only needed to be a suspected sympathiser of the RPF to be targeted on these roadblocks. This resulted in a globalisation of crimes with Tutsis being systematically targeted and eliminated for representing the majority of RPF infiltrators.⁴⁶⁷ He did not discuss the character of the conflict.

The accused, in his turn, spoke about the creation of youth wings and that the *Interahamwe* were the youth wing of the MRND. He did not either say anything about the character of the conflict.

Another witness who was relied upon on this issue was Mr. *Nsanzuwera*, a former public prosecutor in Kigali. He testified on the evolution of the *Interahamwe* as an MRND militia. He also spoke about the swearing in of President Habyarimana on January 5, 1994, the non-swearing in of the transition government and national assembly as well as of certain obstacles that prevented the full participation of other political parties in the interim government. He finally testified on the insecurity that ensued in Kigali and the crashing of the presidential aircraft on April 6, 1994. He emphasised the fact that after the death of the president, the interim government appealed to the population to join the civil defence and the RAF to fight against the RPF and eliminate the moderate wing within the government. According to Mr. *Nsanzuwera*, the civil defence was mainly composed of *Interahamwe* members and radical youth wings of other political parties like the CDR which aimed at the elimination of the Tutsi as a support for the RPF. Mr. *Nsanzuwera* added that the RPF battalion which was in Kigali engaged in hostilities⁴⁶⁸ with the Rwandan troops. He said nothing whatsoever on the nature of the conflict and the nature of the conflict cannot be deduced from the facts he testified to.

The Chamber finally referred to the testimony of a defense witness, Professor *Mbonimpa* as well as to the testimony of the accused. The accused testified that roadblocks were set up

⁴⁶⁶ *Rutaganda*, (TC), para 378.

⁴⁶⁷ *Rutaganda*, (TC), para 378.

⁴⁶⁸ *Rutaganda*, (TC), para 378.

initially by civilians who, as the "civil defence" were rallying together against the RPF. Professor *Mbonimpa* called the RPF a militia and agreed that militia also had a command structure, wore a different uniform, was armed, and capable of carrying out war. Both sides mobilised people for war through their respective radios. He stated that the RPF said that any force that intervened in the conflict was regarded as an enemy force.⁴⁶⁹

This is the only factual evidence the Chamber advanced to finally conclude to the existence of a state of non-international armed conflict.⁴⁷⁰ The Chamber did not want to go any further but only adhered to the findings in *Akayesu*. It expressed its view by noting the findings in the *Akayesu* judgment and found that the evidence established that there existed an internal armed conflict in Rwanda during the time period alleged in the indictment.

In the *Musema* case, the Chamber relied on the testimony of the accused. It noted that the defense admitted that, at the time of the events alleged in the indictment, there existed an internal armed conflict meeting the temporal and territorial requirements of both Common Article 3 and Additional Protocol II. Further, evidence presented during the trial, in particular the testimony of *Musema*⁴⁷¹, demonstrated the full extent of the conflict between the dissident armed forces, the FPR, and the Government forces, the FAR, in Rwanda throughout the period the offences were said to have been perpetrated. It was only on this basis the Chamber found that it had been established beyond a reasonable doubt that at the time of the events alleged in the indictment there existed a non-international armed conflict meeting the requirements of Common Article 3 and Additional Protocol II⁴⁷². However, *Musema* was not qualified to characterise the conflict.

The same shortcut procedure was used in the *Kamuhanda* case. One paragraph⁴⁷³ of the indictment asserted that during the events referred to, a state of non-international armed conflict existed in Rwanda.⁴⁷⁴ The accused did not discuss that fact. He admitted that during

⁴⁶⁹ *Rutaganda*, (TC), para 378.

⁴⁷⁰ *Rutaganda*, (TC), para 382.

⁴⁷¹ *Musema*, (TC), para 970.

⁴⁷² *Musema* (TC), para 971.

⁴⁷³ *Kamuhanda* Indictment, para 2.5

⁴⁷⁴ *Kamuhanda*, (TC), para 240.

the events referred to in the Prosecutor's request to admit facts, a state of non-international armed conflict existed in Rwanda.⁴⁷⁵ By this simple admission by *Kamuhanda*, the Trial Chamber concluded that the Parties did not contest the state of non-international conflict taking place in Rwanda at all relevant times alleged in the indictment.⁴⁷⁶ Based on this conclusion, the Chamber found that: "It has been established, for the purposes of this case, that a state of non-international armed conflict existed in Rwanda as of April 6, 1994 to mid-July 1994 when the accused left the country."⁴⁷⁷ As the Chamber stated, the non-international character, not even contested by the accused, was to be considered for the purpose of this case only. What the Chamber needed to do in the *Kamuhanda* case was to find out whether or not his acts were related to the armed conflict, whatever its character might be. The admission by *Kamuhanda* does not change the character of the conflict.

Notwithstanding the factual and legal findings arrived at in all the earlier judgments of the Tribunal, most of the time pursuant to judicial notices, Trial Chamber III concluded in *Semanza* that it took judicial notice of the fact that between January 1, 1994 and July 17, 1994 in Rwanda there was an armed conflict not of an international character. The Chamber emphasised that it had no doubt as to the nature of the conflict. Therefore, the Chamber found that, during the events referred to in the indictment, there was a non-international armed conflict on the territory of Rwanda between the Government of Rwanda and the RPF⁴⁷⁸.

The Chamber rejected the contentions of the defense that the Prosecutor had never established the existence of a non-international armed conflict in Rwanda. The defense argued that "monumental" evidence reflected the existence of an international armed conflict involving Uganda⁴⁷⁹. The finding of the Chamber was based on its decision pursuant to a motion for admission of facts by the prosecution⁴⁸⁰ that read in the following terms:

⁴⁷⁵ *Kamuhanda*, (TC), para 241.

⁴⁷⁶ *Kamuhanda*, (TC), para 242.

⁴⁷⁷ *Kamuhanda*, (TC), para 738.

⁴⁷⁸ *Semanza* (TC), para 281.

⁴⁷⁹ *Semanza*, (TC), para 66.

⁴⁸⁰ *Prosecutor v. Semanza*, Case No. 97-20-I, *Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54*, TC, November 3, 2000, para 48, Annex A, para 3. *See* Annex II, Part A, para 3.

“Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.” The same approach guided Trial Chamber III in the *Cyangugu* case⁴⁸¹.

The ICTY on the other hand, distanced itself from the practice of the ICTR. It deeply inquired into the conflict in the former Yugoslavia in any case it was requested to do so by either part without siding with any of the parties or taking forcibly judicial notice for matters in contention.

In the *Blaskic*⁴⁸² case, the Trial Chamber was of the view that “whatever the case, the parties to the conflict may not agree between themselves to change the nature of the conflict, which is established by the facts whose interpretation, where applicable, falls to the Judge”. It further held that “nonetheless, it is this Trial Chamber which is responsible for evaluating the facts before it and determining the true nature of the conflict⁴⁸³”. This entirely dismisses the pretension by the Trial Chamber in *Akayesu* that the SC deemed the conflict in the former Yugoslavia as international by a simple reference to the four Geneva Conventions⁴⁸⁴. The SC did not predetermine the nature of the conflict. Rather, it left judges at liberty to do so. In *Blaskic* the Trial Chamber examined all the evidence held relating to the direct intervention of Croatian troops in the conflict and concluded that

Ultimately, the evidence demonstrated that, although the HV soldiers were primarily in the Mostar, Prozor and Gornji Vakuf regions and in a region to the east of Papljina, there is also proof of HV presence in the Lasva Valley. The Trial Chamber adds that the presence of the HV in the areas outside the CBOZ inevitably also had an impact on the conduct of the conflict in that zone. By engaging the ABiH in fighting outside the CBOZ, the HV weakened the ability of the ABiH to fight the HVO in central Bosnia. Based on Croatia’s direct intervention in BH, the Trial Chamber finds ample proof to characterize the conflict as international⁴⁸⁵.

⁴⁸¹ *Cyangugu Case*, (TC), para 767.

⁴⁸² *Blaskic*, (TC), para 82.

⁴⁸³ *Id.*

⁴⁸⁴ *Akayesu*, (TC), para 606.

⁴⁸⁵ *Blaskic*, (TC), para 94; see also paras 83 - 123.

In this case, the Trial Chamber determined the nature of the conflict because it was in dispute. The defense submitted that the conflict was internal and the prosecution was of the opinion that it was international. The Chamber looked first of all to the direct intervention of foreign troops, and, applying some criteria, found the conflict to be international even under indirect intervention. This debate on the nature of the conflict did not take place before the ICTR.

Another determination of the nature of the conflict in the former Yugoslavia is found in the *Celebici* case⁴⁸⁶. Paragraphs 33 and 50 *in fine* of the Appeals Judgment are ample examples of the work that should have been done by ICTR if it was so willing. Paragraph 33⁴⁸⁷ is a fact finding to the submissions of the parties. Paragraph 50 *in fine*⁴⁸⁸ is a confirmation of the fact-finding where some legal criteria were referred to, allowing the Chamber to arrive at the conclusion that the conflict was international. The ICTR refused to engage in fact-finding and preferred to rely either on the Security Council political decision or on arbitrary judicial notices or on other artificial criteria.

In the *Tadic* appeal judgment⁴⁸⁹ the question of the character of the conflict in Bosnia Herzegovina was again raised. In that case, it falls to the Appeals Chamber to establish first of all (i) on what legal conditions armed forces fighting in a *prima facie* internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether the factual conditions required by law were satisfied. This holding is a predisposition or a readiness by the Chamber to examine the facts with a view to determine the nature of the conflict. The Chamber assumed its prerogative and held that:

The Appeals Chamber will therefore discuss the question at issue first from the viewpoint of international humanitarian law. In particular, the Appeals Chamber will consider the

⁴⁸⁶ *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Essad Landzo*, (“CELEBICI Case”), IT – 96 – 21 – A, February 20, 2001. paras 6 - 50.

⁴⁸⁷ Para 33: The Trial Chamber’s finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadic* that it “is indisputable that an armed conflict is international if it takes place between two or more States”, which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber’s finding of fact that the conflict was international prior to May 19, 1992.

⁴⁸⁸ Para 50 *in fine*: It suffices to say that this Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfill the legal conditions as set forth in the *Tadic* case.

⁴⁸⁹ *Prosecutor v. Dusko Tadic*, Case No IT – 94 – 1 – A, July 15, 1999, para 81.

conditions under which armed forces fighting against the central authorities *of the same State* in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that on whose territory they live and operate.⁴⁹⁰

It can be assumed that the SC had the same spirit when it drafted the Statute of the ICTY as when it drafted the Statute of the ICTR. However, the ICTR's interpretation of the SC attitude is not supported by the facts. This does not mean that the way the SC views the conflict is the same a court is bound to appreciate it. The SC decided to follow reports of the Secretary General, most of the time after considering experts' opinion. In the ICTY case, the commission of experts was of the view that the question of characterising the conflict depended on the applicable law⁴⁹¹. It is the same scenario that was followed in the Rwandan case. It is particularly worthy to note that the Commission of Experts established pursuant to Security Council Resolution 780 (1992) of October 6, 1992 to investigate grave breaches of International Humanitarian law in the former Yugoslavia remarked that:

The treaty law designed for internal armed conflicts is in common article 3 of the Geneva Conventions, Additional Protocol II of 1977, and article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. These legal sources do not use the terms "grave breaches" or "war crimes". Further, the content of customary law applicable to internal armed conflict is debatable (...). Determining when these conflicts are internal and when

⁴⁹⁰ *Tadic*, (AC), para 91.

⁴⁹¹ Confronted with the question of characterising the conflict in the former Yugoslavia, as international or non-international, the Commission of Experts established pursuant to Security Council Resolution 780 (1992) of October 6, 1992 had this to say: (footnotes are omitted)

Classification of the various conflicts in the former Yugoslavia as international or non-international depends on important factual and legal issues. If a conflict is classified as international, then the grave breaches of the Geneva Conventions, including Additional Protocol I apply as well as violations of the laws and customs of war. The treaty and customary law applicable to international armed conflicts is well established. (...) However, as indicated in paragraph 45 of its first interim report, the Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory.

Annex to "Letter dated May 24, 1994 from the Secretary - General to the President of the Security Council", S/1994/674 - 27 May 1994, available at <http://www.his.com/~twarrick/commxyul.htm>, part II, Applicable law, sub A.

they are international is a difficult task because the legally relevant facts are not yet generally agreed upon. This task is one which must be performed by the International Tribunal.⁴⁹²

Two major ideas emerge from this passage and need careful consideration. The first idea is that the “content of customary law applicable to internal armed conflict is debatable”. To a large extent, this means that there is no unanimity yet on the customary law applicable to internal armed conflicts. The second idea is that, based on facts presented before it, it is the duty of the international tribunal to determine “when these conflicts are internal and when they are international”. The room was then open to the ICTY to determine the nature of the conflict in the former Yugoslavia, which it actually did⁴⁹³.

Unlike the ICTY, the ICTR declined to indulge into the search for the nature of the conflict in Rwanda. The fact that the SC did not spell out how it arrived at its finding when determining the conflict in Rwanda, is not an excuse for an international court not to discuss the nature of a conflict. The Commission of Experts established pursuant to Security Council Resolution 935 in its Interim and Final Reports characterised the conflict for the purpose of the ensuring SC decision on action to take. In its findings, the Commission suggested that it was a conflict of an internal character⁴⁹⁴. Unfortunately, it restricted the conflict to a period of three months, that is from April 6 to July 15, 1994 and this is the line that was followed by the ICTR. The Commission further purported that the only outside intervention was for peacemaking and humanitarian assistance, which was not true. It was earlier found that the reference made to neighbouring states in the territorial competence concerned only the issue of security in refugees’ camps but no allegations of violations were made. In the opinion of the writer, the conflict in Rwanda was international from the beginning in 1990 till the end in 1994. It might have some internal character at a certain stage, but this stage was not defined

⁴⁹² *Final Report of the Commission of experts Established Pursuant to Security Council Resolution 780(1992)*, S/1994/674, May 27, 1994, available at <http://www.his.com/~twarrick/commxyul.htm>, part II, Applicable law, sub A.

⁴⁹³ See for instance *The Prosecutor v. Zejnir DELALIC, Zdravko Mucic, Hazim DELIC and Esad LANDZO, AC, (Celebici Case)*, Case No IT – 96 – 21 – A, February 20, 2001, para 6 to 51, *The Prosecutor v. Zlatko Aleksovski*, Case No IT – 95 – 14 /1 – A, March 24, 2000, para 117 – 146; *Blaskic*, para 75 – 123; but most important *The prosecutor v. Dusko Tadic*, Case No IT – 94 – 1- A, July 15, 1999, paras 80 – 162 and *Tadic Appeal on Jurisdiction*, paras 65 - 142.

⁴⁹⁴ The relevant parties of the reports are paragraphs 105 - 109, *Final Report of the Commission of Experts*, op.cit., paras 105 - 109.

by the ICTR. It would not be fair to entertain the idea that there was conflict only in the months of April through July 1994. The forces which invaded Rwanda in 1990 were in their base close to the border, on the Rwandan soil but still benefiting from the support and intervention of Uganda. There was no point in time until the RPF victory or even after, that the chain between it and Uganda was cut.

4.3.2 The doctrine of judicial notice was not fully applied to determine the nature of the conflict in Rwanda.

Coming to the point in time that might have determined the ICTR to characterize the conflict as a non-international one, it is helpful to read the founding provisions particularly Article 3 Common to the Geneva Conventions. The introduction to that article states that “in the case of armed conflict not of an international character **occurring** in the territory of one of the High Contracting Parties. The emphasis is put on the word “occurring” address the issue of the point in time that may be taken as a starting point for analysis. At many points in the judgments of the ICTR, judges referred to the word “outbreak” of war, meaning the start of the war. The war started on October 1, 1990 and continued until the RPF unilaterally declared its end in July 1994. According to the international panel⁴⁹⁵ of eminent personalities to investigate genocide in Rwanda and the surrounding events:

The civil war launched that day [1 October 1990] lasted, with long periods of ceasefire, for close to four years. Its final three months coincided with the period of the genocide, which was halted only by the ultimate triumph in July 1994 of the refugee-warriors over the “genocidaires” (the French word for perpetrators of genocide, widely used even by English-speaking Rwandans). By that time, hardly anyone seemed to remember that an eight-point political platform had been issued by the RPF prior to the invasion. Even in 1990, it had been mostly important as a public

⁴⁹⁵ The panel was composed of Sir Quett Ketumile Jono Masire, former President of Botswana as Chairman; General Ahmadou Toumani Touré, Former and current President of Mali; Lisbet Palme, Former Chairman of the Swedish Committee for UNICEF, Expert on the UN Committee on the Rights of the Child; Ellen Johnson-Sirleaf, Former Liberian Government Minister and Former Executive Director of the Regional Bureau for Africa of the United Nation Development Programme; Justice P.N. Bhagwati, Former Chief Justice of the Supreme Court of India. Senator Hocine Djoudi, Former Algerian Ambassador to France and UNESCO, Permanent Representative to UN; and Ambassador Stephen Lewis, Former Ambassador and Permanent Representative of Canada to UN, Former Executive Director of UNICEF.

relations document. Its drafters had observed Museveni's shrewd appeal to a wide range of potential supporters in Uganda.⁴⁹⁶

The ceasefires cannot be taken as an end of war. Neither can the Arusha peace accord signed on August 4, 1993 be considered as the end of the war. The mere fact that the Statute of the ICTR provides for the Tribunal's competence to run from January 1, 1994 up to December 31, 1994 does not preclude it from inquiring into a subject which is central to its competence as far as Article 4 of the Statute is concerned. The Tribunal even does this exercise to better determine the offences of conspiracy, as earlier seen in the temporal aspects of competence before 1994.

In not inquiring into the whole timeframe of the war, the Tribunal seemed to side the RPF; to justify that the attack was necessary and justifiable.⁴⁹⁷ On the hand, the Tribunal believed that the conflict was used as a pretext to implement an already existing policy of discriminating against Rwandan Tutsis⁴⁹⁸. Holding that the conflict was used as a "pretext" however contradicts the Chamber's position that "in order to understand the events alleged in the indictment, it is necessary to say, however briefly, something about the history of Rwanda, beginning from the pre-colonial period up to 1994"⁴⁹⁹. It is this point of view which blindfolded the ICTR into minimising the impact of war on subsequent humanitarian law

⁴⁹⁶ *International Panel*, op. cit., para 6.18.

⁴⁹⁷ See *Kayishema and Ruzindana* (TC), para 45. "The Rwandan Patriotic Front (the RPF) was created as a response to the Tutsi Diaspora's frustration with the international community's minimal attention to the emotionally charged refugee problem. In October 1990, the RPF launched an attack into northeastern Rwanda from Uganda"; and Akayesu at par. 95: "At the same time, Tutsi exiles, particularly those in Uganda organized themselves not only to launch incursions into Rwandan territory but also to form a political organisation, the Rwandan Patriotic Front (RPF), with a military wing called the Rwandan Patriotic Army (RPA). The first objective of the exiles was to return to Rwanda. However, they met with objection from the Rwandan authorities and President Habyarimana, who is alleged to have said that land in Rwanda would not be enough to feed all those who wanted to return. On these grounds, the exiles broadened their objectives to include the overthrow of Habyarimana". It is worthy to note that it is only in these two cases where an attempt of a certain historical background was made. This would explain the no-value given to the conflict.

⁴⁹⁸ "On 1 October 1990, an attack was launched from Uganda by the Rwandan Patriotic Front (RPF) whose forebear, the Alliance Rwandaise pour l'unité nationale ("ARUN"), was formed in 1979 by Tutsi exiles based in Uganda. The attack provided a pretext for the arrest of thousands of opposition members in Rwanda considered as supporters of the RPF". *Akayesu*, (TC), para. 93 *in fine*.

⁴⁹⁹ *Kayishema and Ruzindana*, (TC), para 78.

violations⁵⁰⁰. The ICTR focused its attention on the then Government of Rwanda using the war as a pretext, as if it is the same Government, which launched the conflict.

4.3.3 Assessment of the *nexus*

One issue must be highlighted. When reading some judgments of the ICTR⁵⁰¹, there seems to be confusion as to whether the nexus that is required is one between the perpetrator and the armed conflict or the military, or between the criminal conduct (the acts) of the perpetrator which needs to be related to the armed conflict. In two cases, namely *Akayesu* and *Kayishema and Ruzindana*, the Trial Chambers referred to both situations, and it is not clear which one bears the nexus. In other cases, the trial Chambers adhered to the *nexus* between acts of the accused and the armed conflicts, but on the theoretical ground without a factual substantiation⁵⁰².

In only two judgments⁵⁰³ did the Trial Chamber attempted (with dissent) to substantiate the *nexus*. In *Semanza*, for instance, the Trial chamber was of the view that “whether the requisite *nexus* existed at the time of the alleged offence is a matter for determination on the evidence presented. It has been the position of this Tribunal and of the ICTY that the *nexus* requirement is met if the alleged offence is ‘closely related to the hostilities’ or is ‘committed in conjunction with’ them⁵⁰⁴. In the *Cyangugu Case*, Trial Chamber III found that:

the soldiers’ actions were motivated by their search for enemy combatants and those associated with them or; at least, that their actions were carried out under the pretext of such a search. As such, the Chamber considers that the soldiers were acting in furtherance of the armed conflict or under its guise.⁵⁰⁵

The ICTR has abandoned its theory of categorising potential violators of Common Article 3 and Additional Protocol II, pointing particularly a finger to military personnel or other

⁵⁰⁰ Filip Reyntjens put it in other words as follows: “another caution is that – and I that the press also talked about this – if RPF had not waged the war it waged there wouldn’t have been genocide in Rwanda. Therefore, if the RPF ended the genocide – repeat what I said – the RPF is also politically co-author of the genocide.” Transcripts of court proceedings, November 24, 1997, p 36, line 6 – 12.

⁵⁰¹ See for example *Akayesu*, (TC), para 640 – 642; *Kayishema and Ruzindana*, (TC), paras 173, 175, 617, 618.

⁵⁰² See for illustration *Musema*, (TC), para 259 – 262, 973 – 974.

⁵⁰³ See *Semanza*, (TC), paras 516 – 522, *Cyangugu Case*, (TC), paras 792 – 793.

⁵⁰⁴ *Semanza*, (TC), para 369.

⁵⁰⁵ *Cyangugu Case*, (TC), para 973.

repositories of public authority. The Chambers relied primarily on article 6 of the Tribunal's Statute that establishes responsibility as a first step for determining whether a *nexus* exists or not⁵⁰⁶. It seems that the armed conflict is no more at issue, rather it is the military, whether in combat operations or not⁵⁰⁷.

Court decisions have therefore attempted to set out criteria for determining the required *nexus*, but there are no widely accepted criteria that can be relied upon to this end. In *Rutaganda* case, it was the view of the Chamber that:

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties⁵⁰⁸.

Having quoted this passage from the trial Chamber's judgment, the Appeals' Chamber emphasised that "the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one⁵⁰⁹".

The question of "nexus" continues to cause more problems especially when in some circumstances pretexts of any kind are put forward in order to find a *nexus* to any kind of disorder. Recently, the U.S. Military Commission Rules considered that an offence prosecutable by the commission must have taken place 'in the context of and was associated with armed conflict. The definition of the armed conflict is so broad however, that virtually any terrorist act anywhere in the world would be within the commission's jurisdiction. The rules provide that the *nexus* between the defendant and armed conflict could involve, but is

⁵⁰⁶ See for illustration *Kayishema and Ruzindana*, (TC), para 174.

⁵⁰⁷ para 175 of the *Kayishema and Ruzindana* case speaks it all out:

Thus, individuals of all ranks belonging to the armed forces under the military command of either of the belligerent Parties fall within the class of perpetrators. If individuals do not belong to the armed forces, they could bear the criminal responsibility only when there is a link between them and the armed forces. It cannot be disregarded that the governmental armed forces are under the permanent supervision of public officials representing the government who had to support the war efforts and fulfill a certain mandate.

⁵⁰⁸ *Rutaganda* (TC), para 59, cited in Appeals' Chamber Judgment, para 569.

⁵⁰⁹ *Rutaganda*, (AC), para 570.

not limited to, time, location, or purpose of the conduct in relation to the armed hostilities...this element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the *nexus* so long as its magnitude or severity rises to the level of an armed attack or an act of war, or the number, power, stated intent or organisation of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force⁵¹⁰. This is a very dangerous interpretation. The question is not whether such conduct can properly be criminalised but rather which court should exercise jurisdiction.

⁵¹⁰ *Human Rights Watch Briefing Paper on U.S. Military Commissions*, June 25, 2003.

Chapter 5: Conclusion

The aim of this work was to answer some of the questions related to the work of the ICTR in relation to its jurisdiction under article 4 of its Statute. It first of all discussed how the offences under that particular competence were committed, where, when, and who was involved. In a swift and direct manner, it goes to the issue relevant to its rationale, the ICTR approach to Article 3 Common to the four Geneva Conventions and Additional Protocol II, on a factual and legal basis.

The ICTR was established to prosecute serious violations of IHL committed in Rwanda from January 1, through December 31, 1994. However, this timeframe did not meet all expectations because it restricted the coverage of all atrocities that were committed during the four years of the conflict. The temporal jurisdiction of the ICTR was limited to the year 1994. As one scholar⁵¹¹ rightly put it, the establishment of the tribunal did not solve all problems. While the war began with the invasion of northern Rwanda in 1990 and culminated in the RPF assumption of state power in July 1994, the Tribunal's time span of investigation is different. This time span was basically designed to enable the prosecutor to show how the genocide was planned and to hide the invasion from Uganda from October 1990. Since the militias, the former army and the media, regrouped after the RPF victory and consolidated their position in the refugee camps in Zaïre, the plan remained⁵¹². However, the analysis shows that there were no crimes subject-matter of the Tribunal's jurisdiction which were committed in the refugee camps.

Another criticism is the selective prosecution in addressing serious violations of IHL. Prosecuting only Hutu perpetrators will seriously impede the process of national reconciliation, one of the two objectives of the ICTR. Political observers in Arusha say that the overall direction of the proceedings is completely one-sided, and that important international aspects of the conflict which led to the catastrophe were deliberately excluded

⁵¹¹ Van den Herik L. J, op cit., p 48.

⁵¹² Ibidem, p 9.

from the deliberations of the Tribunal.⁵¹³ Some call the proceedings victors' justice; others even say that it is the legal lynching of the former Hutu elite of Rwanda.⁵¹⁴ Considering the fact that the basis for the UN Resolution 955 was a request by the RPF government, the least one can say is that the tribunal is tainted by political expediency in favour of the victorious RPF. It would be right to say that the Tribunal was primarily established to prove that genocide had been committed and other crimes had not been given the same weight. The genocide consensus hardened and become a catch-all explanation for the conflict. No attempt to understand the conflict in Rwanda that countered the official interpretation could be allowed to stand.⁵¹⁵ Investigating war crimes was not a major concern. In fact, the context of war was removed altogether in the Tribunal reading of events.⁵¹⁶

By characterising the conflict as internal in nature, the real sources of tensions in Rwanda were obscured. Future generations which will read the judgements of the ICTR in an attempt to determine its nature, will never know the causes of the conflict. They will only learn that there was "genocide". Why did the genocide suddenly occur? Because the then Rwanda Government planned it and instigated people to exterminate Tutsis. That will be the answer. These generations will never know that RPF was formed in Uganda by a group of Rwandan Tutsi exiles, who were fighting as part of the Ugandan NRA. Instead of trying to understand the war and its root causes to finally understand its consequences, the task at hand became, as an analyst wrote⁵¹⁷, one of psychoanalysing Hutu hatred. It is a curious way of making the history of a nation.

International law applicable to the conflict in Rwanda was analysed theoretically. The outcome of this analysis demonstrates how all the requirements or conditions of applicability should have been approached. The key condition for the application of IHL subject matter of the ICTR jurisdiction is the existence of an armed conflict. In this work, an attempt has been made to characterise the conflict in Rwanda. Obviously the author agrees with the

⁵¹³ *Executive Intelligence Review*, July 26, 2002 issue, pp 1 – 4, at p 1; taken from http://www.larouchepub.com/other/2002/2928arusha_trib.html; accessed on June 7, 2005.

⁵¹⁴ *Ibidem*.

⁵¹⁵ Crawford B., p 14.

⁵¹⁶ Crawford B., op cit, p 9.

⁵¹⁷ Crawford B., op. cit. p 12.

humanitarian character of the provisions of common article 3 and additional protocol II. Moreover, this part of humanitarian law can be fully implemented if all the conditions set forth were scrupulously adhered to and applied to the facts. This goes towards the rendering of equitable and fair justice, which can bring about national reconciliation in Rwanda. On a purely theoretical level, the ICTR is a precedent-setting institution, developing international law by applying concepts which have never been used in practice before, particularly the concept of genocide as distinguished to crimes against humanity and war crimes. This is a great success for the ICTR.

The armed conflict in Rwanda presented more international ingredients if one looks at its starting point without much focusing on the nationality of the attackers, which, was not even in dispute. Although the issue at bar was humanitarian law, it was also suggested that other aspects of international law were to be treated equally, like state responsibility and the notion of aggression. Offences committed during an armed conflict must be closely linked to it so as to hold their authors accountable.

The jurisdiction of the ICTR comprises material, personal, temporal and territorial dimension. Article 4 of the statute was deeply analysed as it encompasses elements that those accused of violations were charged with, namely murder, torture, and degrading or humiliating treatment against persons protected under Common Article 3 and Additional Protocol II. The ICTR Statute does not mention specific provisions of Protocol II, but refers more generally to violations of Common Article 3 to the Geneva Conventions of 1949 and the 1977 Additional Protocol II (article 4(2)). A limited number of paragraphs of the protocol were used. Other paragraphs listed in Article 4 of the ICTR Statute, such as the taking of hostages and terrorism were not applied or interpreted by the ICTR. Despite the non-exhaustive nature of the article, the tribunal had not used its discretion to broaden the scope of war crimes in internal armed conflict. In most instances, the individual acts were defined with reference to comparable acts as crimes against humanity. However, this was not done consistently. The option undermines the coherence of the jurisprudence as a whole.

Personal competence was concerned with individuals who allegedly committed crimes falling in the material competence. It was expressed that both parties to the armed conflict committed crimes punishable under the ICTR Statute but that only one party is facing prosecution which may rightly be called selective prosecution. Only physical persons were prosecuted. Article 4 of the ICTR made an innovation in criminalising violations of IHL committed in an internal armed conflict thereby rendering individuals accountable for their deeds. This article covers acts which do not fall within the definition of crimes against humanity or genocide. It is an important distinction. Therefore the crucial question whether individual responsibility for violations of Article 4, particularly the relevant provision of Additional Protocol II applied under international law was left open, as well as the question about what should be the consequence of a finding that violations of Common Article 3 or of the 1977 Additional Protocol do not entail individual responsibility.

The territorial competence covers the Republic of Rwanda as well as neighbouring States. But it was remarked that no offences were charged for having been committed outside of the borders of Rwanda. The report of the Secretary General that was relied on spoke about security concerns in the refugees' camps but did not address criminal conducts in the neighbouring states, which were not even named. Such inclusion was therefore superfluous.

To better illustrate the aim and scope of this research, some important cases were analysed on the fact, the merit and the applicable law as well as the final decision of the Trial and Appeals chambers, where available. The objective was to compare to what extent the requirements for the application of Article 4 of the Statute were met in each case.

There was particular attention to the conditions that were relied upon to not make legal findings of guilt in *Akayesu*, *Kayishema* and *Ruzindana*, *Musema* as well as *Rutaganda* on the Trial Chamber level. The question of absence of sufficient *nexus* was overturned in *Rutaganda* as well as was the “*agency test*” which was qualified as restricting the applicability of article 4 of the Statute in *Akayesu* on appeal. This view was upheld in *Kamuhanda* trial judgment. The special relationship is not a condition to the application of

Common Article 3 and, hence, of Article 4 of the Statute⁵¹⁸. The Appeals Chamber stressed that criminal responsibility for the commission of any act covered by Article 4 of the Statute is not conditional on any defined classification of the alleged perpetrator⁵¹⁹.

In the *Musema* case, the Trial Chamber assessed three conditions for applicability of article 4 of the Statute: the existence of a non-international armed conflict, the fact that the victims were unarmed civilians protected under Common Article 3 and Additional Protocol II as well as the *nexus*. The Chamber did not suggest whether these protected persons were not directly taking part in the hostilities at the time of the alleged violations.⁵²⁰ However, this point was deeply discussed in *Kayishema and Ruzindana* where the Chamber pointed out that:

If the victims “took no part in the hostilities” this is one situation, but if these persons “were taking no active part in the hostilities” this is another situation and in this case there is a need to prove that these men, women and children participated indirectly in the hostilities or at least committed harmful acts against the Party in the conflict⁵²¹.

However, the issue around the protected persons was resolved in the *Kamuhanda* case. The Chamber suggested answering the question whether at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities. It is only when the answer is in the negative that the victim was a protected person under Common Article 3 and Additional Protocol II.

Looking at the *nexus*, the Chamber stated that the offences must be closely related to the hostilities or committed in conjunction with the armed conflict to constitute serious violation of Common Article 3 and Additional Protocol II. The prosecutor’s case was dismissed because, in the Chambers’ finding, the prosecution failed to demonstrate the *nexus* between

⁵¹⁸ *The prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, January 22, 2004, para 728.

⁵¹⁹ *Kamuhanda*, (TC), para 729.

⁵²⁰ This suggestion is the one adopted in *Cyangugu Case*, while in *Kayishema and Ruzindana*, the Chamber opts for “persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those who are hors de combat”, at para 604.

⁵²¹ There is a need to emphasize the fact that sub 1 of Common Article 3 reads as follows: “1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause...” while sub 1 of article 4 of Additional Protocol II talks of “1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted...”

the acts for which Musema was individually criminally responsible, including those for which he was individually criminally responsible as a superior and the armed conflict⁵²². None of the parties appealed this decision on war crimes in this particular case.

Surprising also was the decision by the Chamber that once the existence of “a state of non-international armed conflict” condition is fulfilled, the accused will incur criminal responsibility if the prosecution proves beyond reasonable doubt that he was directly engaged in the hostilities, acting for one of the conflicting parties in the execution of their respective conflict objectives.⁵²³ When assessing the existence of a *nexus* some factors may play a role. These criteria are indicative and there is nothing suggesting that the focus should be military operations or military personnel. Any person can commit a war crime, as long as a link between the crime and the armed conflict is established. Military personnel can be in combat operations but in many instances they are not the policymakers nor are they the ones who, at first hand, got involved into violations of IHL.

Semanza was the first case where the Trial Chamber found an accused guilty of violation of article 4 of the Statute with a dissenting opinion even though no conviction was entered. In the opinion of Judge *Ostrovsky*, the majority arrived at the guilt finding hastily. He argued that this was oversimplifying the matter. *Imanishimwe* is the second case of an accused found guilty and convicted for serious violations of Common Article 3 and Additional Protocol II. In this particular case, there was also a dissenting opinion based on considerations of imprecision in the indictment. The overall criterion of finding *Imanishimwe* guilty of violation of article 4 of the Statute was the fact that he was in a command position. This extrapolation of command responsibility is a step further in developing rules applicable to persons in position of authority. It goes to the ICTR credit. Other cases⁵²⁴ did not advance a

⁵²² *Musema*, (TC), para 969 - 975.

⁵²³ *Kamuhanda*, (TC), para 739.

⁵²⁴ The *Prosecutor v. Ignace Bagilishema*, ICTR – 95 – 1A – T, June 7, 2001 and ICTR – 95 – 1A – A, February 25, 2002, *Bagilishema* was acquitted on all counts including the one referring to Common Article 3 and Additional Protocol II; in *Ntakirutimana*, (TC), para 860, it was the view of the Chamber that up until that date, no findings of guilt have been made on this provision by the Tribunal. In the ICTY, in *Vasiljevic*, it was held that customary international law does not provide a sufficiently precise definition of a crime under this provision. Therefore, based on the principle of *nullum crimen sine lege*, the Accused was acquitted on this count in *Vasiljevic* (para 193-204) ; Apart from the lack of clarity about this provision, the Chamber was not satisfied that the settled elements of the offence, such as the existence of a nexus between the alleged act or acts and the

researcher as far as Common Article 3 and Additional Protocol II are concerned. There was no analysis of cases in which the accused persons pleaded guilty⁵²⁵ to all charges including under article 4 of the Statute. These cases did not offer an opportunity to debate the different components of the provision regarding war crimes.

The Trial chambers did not endeavour to question whether the conflict in Rwanda was exclusively internal. They just arrived at their conclusion by the shortcut path, particularly through judicial notice. All concurred in ascertaining that it has been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF⁵²⁶. The approach to this condition is undisputedly the same in all judgments handed down by the Trial Chambers. It constitutes the cornerstone to clarify the situations in order to establish whether the alleged crimes referred to in the indictments could be qualified as violations of Common Article 3 and Protocol II⁵²⁷.

The Chambers relied to a very great extent on pre-existing UN documents that also served as the basis for the SC's determination that the conflict was an internal one. The additional value of the ICTR's case law in this regard is therefore very limited. The question of third state interference in the Rwandan conflict has not been addressed by the ICTR. Uganda played an important role in the conflict. The question concerned was not whether that state could be held responsible for any crime committed, but rather that, that involvement was to render the conflict international. Since the ICTR deemed it necessary to undertake its own study into the character of the conflict, it should have taken account of all the factors, and it should have qualified them in legal terms. This exercise would have provided the ICTR with the opportunity to address the sensitive issue of third state interference and to develop its

armed conflict, have been proved in the present case, par 861; *The Prosecutor v. Niyitegeka*, ICTR – 96 – 14 – T, May 16, 2003 was not guilty as Counts (9 and 10) relating to violations of common article 3 and additional protocol II were withdrawn by the prosecution in its closing brief, see para 468 and 469 of judgment; in *Kajelijeli*, (TC) the accused was not guilty because on September 13, 2002, following the close of the case for the Prosecution, the Chamber granted in part a Defense motion for acquittal (pursuant to Rule 98bis) and entered a Judgment of acquittal in respect of Counts 10 and 11 of the indictment (Violations of Common Article 3 and Additional Protocol II of the Geneva Convention), Judgment, para 22.

⁵²⁵ Those cases up to date are: *The Prosecutor v. Jean Kambanda*, Case No. ICTR – 97 – 23 – T, September 4, 1998 and ICTR – 97 – 23 – A, October 19, 2000; *The Prosecutor v. Omar Serushago*, Case No. ICTR – 98 – 39 – T, February 5, 1999 and ICTR – 98 – 39 – A, April 6, 2000; *The Prosecutor v. George Ruggiu*, Case No. ICTR – 97 – 32 – T, June 1, 2000.

⁵²⁶ See for instance *Akayesu* (T), para 639.

⁵²⁷ *Kayishema and Ruzindana*, (T), para. 595, see also *Musema* para 971.

own legal view on this issue, in this way furthering the ongoing development of international law on the matter.⁵²⁸ The Trial Chambers did not specifically indicate the duration of the armed conflict. They only confirmed that an armed conflict existed at the time of the alleged crimes. They did so through judicial notice despite the absence of consistency about the duration, which is vicious.

It has been demonstrated how far behind the ICTR is in constructing a consistent jurisprudence under Article 4 of its Statute. There is poor argumentation surrounding the requirements for applicability of Common Article 3 and Additional Protocol II. Although the Trial Chambers clearly understand the legal basis of these provisions, they do not apply them to the facts or to the evidence adduced. Up to now, there are no clear, unanimous criteria that can be put forward to qualify the conflict that took place in Rwanda as non-international in character. The Trial Chambers are also not unanimous on how to approach the question of *nexus*. Their views also differ as regard the requirements to rely on for the applicability of Common Article 3 and Additional Protocol II.

Finally, it is worthy to quote *Herik* about the ICTR. He states that

the concept of war crimes in internal armed conflict had not fully matured when the ICTR started functioning. Therefore, the ICTR had the unique opportunity of basing this crime in the international legal order, an opportunity it did not take. Although the ICTY paved the way with some groundbreaking case law in this respect, the ICTR did not follow. It chose its own route, which did not take appropriate account of the intricacies of public international law and the process of law-making in this legal system. Refraining from undertaking a legal discussion outside the scope of its own functioning, the ICTR reduced its contribution to a simple application of law in its own context.⁵²⁹

This conclusion is correct as long as war crimes are at issue. However, the Tribunal made tremendous development of the law as regards genocide and individual accountability in an international court. Unfortunately, genocide was not the topic of this research. Because the Tribunal is still handling cases which comprise the charge of violations of article 4 of its

⁵²⁸ *Ibidem*, p 226.

⁵²⁹ Van den Herik, L.J., *op. cit.*, p 244.

Statute, it should consider reviewing all the shortcomings emphasised in this work. It is a simple matter of redressing the *statu quo* about the characterisation of the conflict and drawing inferences wherefrom. The new findings relating to war crimes, if any, will not alter any existing judgment, but will, instead remain as a legal legacy. It is therefore hoped that the pending cases will go deeper and emphasise the need for a consistent and advancing jurisprudence of the ICTR in war crimes. Can this wish be attained in the remaining two to four years before the Tribunal ends its mandate?

Bibliography

Books and chapters in books

- Abi-Saab R., “Humanitarian Law and International Conflicts: the evolution of legal concern”, in Delissen A. J. M. and Tanja G., *Humanitarian Law of Armed Conflict: Challenges Ahead, essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp 209 – 223
- Archbold 2002, *Criminal Pleadings, Evidence and Practice*, Sweet &Maxwell, London, 2002
- Archbold 2004, *Criminal Pleadings, Evidence and Practice*, Sweet &Maxwell, London, 2004
- Bassiouni M. C., *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Inc., Irvington-on-Hudson, New York, 1996
- Bennouna M., “The characterisation of the Armed conflict in the Practice of the ICTY”, in May R and others, *Essays on ICTY Procedure and evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague – London – Boston, 2001, pp 55 – 64
- Bothe M., “War Crimes in Non-International Armed Conflicts”, in Dinstein Y and Tabory M, *War Crimes in International Law*, Buchmann Faculty of Law, Tel Aviv, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996, pp 293 – 304
- Cassese A., *International Criminal Law*, Oxford University Press, 2003
- Crystal D, *Cambridge Encyclopedia*, Cambridge University Press, 1990
- De Preux J., *The Geneva Conventions of 12 August 1949: Commentary; III Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960
- Des Forges A, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, Paris, 1999
- Dinstein Y., *War, aggression and self-defense*, second edition, Cambridge University Press, 1994
- Fleck D., *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995

- Forsythe D.P., “Politics and the International Tribunal for the Former Yugoslavia”, in Clark R. S. and Sann M., *The prosecution of International Crimes*, Transaction Publishers, New Brunswick and London, 1996
- Gall L., Self-defense in International Law and its impact on Human Rights in the Aftermath of Armed response, University of Lund, Malmö, December 2003
- Green L. C., *The Contemporary Law of Armed Conflicts*, Manchester University Press, 1993
- Hampson F., “Human Rights and Humanitarian Law in Internal Conflicts”, in Meyer M A., *Armed Conflicts and the New law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, pp.55 - 80
- International Committee of the Red Cross, *Commentary of the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva, 1987
- John R.W. D., *The Practice of the International Tribunal for the Former Yugoslavia and Rwanda*, second edition, Transnational Publishers, Inc., Ardsley, NY, 2000
- Kalshoven F., “Applicability of customary international law in non-international armed conflict” in Cassese A., *Current Problems of International Law, essays on U.N. Law and on the Law of Armed conflict*, Milano – Dott. A. Giuffrè Editore, 1975, pp. 267 – 285
- Kwakwa E K, *The International Law of Armed conflict: personal field of application*, Kluwer Academic Publishers, Dordrecht/Boston/London, 1992
- Sullivan E., Judicial Notice, in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague – London – Boston, 2001, pp329 – 339
- Moir L, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002
- Prunier G., *La crise Rwandaise: structure et déroulement*, Writnet, 1994
- Rosenblad E, *International Humanitarian Law of Armed Conflict, Some Aspects of Distinction and Related Problems*, Henry Dunant Institute, Geneva, 1979
- Sassòli M and Bouvier A A, *How does Law Protect in War: Cases, Documents, and teachings materials on contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, Geneva, 1999

- Schermers H G., “The Obligation to intervene in Domestic Affairs of States”, in Delissen A. J. M. and Tanja G., *Humanitarian Law of Armed Conflict: Challenges Ahead*, Essays in Honour of Frits Kalshoven, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp 583 – 593
- Schindler D and Toman J, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Part I, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1988
- Sunga L. S., *The emergency of International Criminal Law, Development in Codification and Implementation*, Kluwer Law International, The Hague, Boston, 1997
- Van den Herik, L. J., *The contribution of the Rwanda Tribunal to the Development of International Law*, Amsterdam, 2005.

Articles

- Bugnion F., “Guerre juste, guerre d’agression et droit international humanitaire”, in *Revue Internationale de la Croix – Rouge (RICR)/ International Review of the Red Cross (IRRC)*, septembre/September 2002, Vol. 84 No 847, pp 523 – 546
- Cohan J. A., “Legal War: When Does It Exist, and When Does It end?”, in *Hastings International and Comparative Law Review*, Volume 27, Number 2, Winter 2004, pp 221 - 318
- Mbata A B M., “Conflict in the Democratic Republic of Congo: An international legal perspective”, in *South African Yearbook of International Law*, Vol. 28, 2003, pp 82 – 109
- Stuart J.G., “Towards a single definition of armed conflict in international humanitarian law: A critique of Internationalized armed conflict”, in *International Review of the Red Cross*, Volume 85, No. 850, June 2003, pp 313 – 350
- Tavernier P., “The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda”, in *International Review of the Red Cross*, No 321, p.605-621, December 31, 1997.
- The New Vision, “We were forced into Congo”, in *The New Vision*, September 17, 1998.
- Bjørn Møller, “Kosovo and the Just War Tradition”, Paper for the Commission on Internal Conflicts at the 18th IPRA Conference in Tamere, 5 – 9, (unpublished), August 2000

Internet sources

- Crawford B., “Rwanda: Myth and Reality”, available at <http://www.africa2000.com/INDX/rwanda.htm>, modified on December 11, 1996, accessed on June 11, 2005
- EJIL, The International Criminal Tribunal for Rwanda, available at <http://www.ejil.org/journal/Vol7/No4/art3-03.html>, accessed on February 18, 2005.
- Freeman M., “International Law and Internal Armed Conflicts: Clarifying the Interplay between Human Rights and Humanitarian Protections”, in *The Journal of Humanitarian Assistance*, available at <http://www.jha.ac/articles/a059.htm>, posted on October 17, 2000, accessed on January 15, 2005.
- Gandhi M., “Common Article 3 of Geneva Conventions of 1949 in the era of International Criminal Tribunals”, in *ISIL Year Book of International Humanitarian and Refugee Law*, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>, accessed on November 17, 2004.
- Gasser H.P., International humanitarian law and the protection of war victims, available at <http://www.humanitarianlaw.htm>, accessed on January 18, 2005.
- Institute for Historical Review, “Judicial Notice of the Holocaust”, *Journal of Historical Review*, spring 1982, Volume 3, Number 1, available at <http://www.ihr.org/jhr/v03p-43 Staff.html>, accessed on January 16, 2005.
- Jinks D. “The Temporary Scope of application of International Humanitarian Law in Contemporary Conflicts”, in *International Humanitarian Law Research Initiative, Harvard Program on Humanitarian Policy and Conflict Research*, January 2003, also available at <http://www.hsph.harvard.edu/hpcr>, accessed on January 18, 2005.
- The International Criminal Tribunal for Rwanda: The Jurisdiction of the International Tribunal, available at <http://www.ejil.org/journal/Vol7/No4/art3-03.html>, accessed on accessed on February 18, 2005.
- Philpot J, *The International Criminal Tribunal for Rwanda: Justice Betrayed*, American Association of Jurists, Montréal, Québec, October 1995, available at <http://www.udayaton.edu/~rwanda/articles/philpot.html>, accessed on January 15, 2005.

Soliman M. S. Jr, "The International Criminal Court and rebel Groups", available at <http://www.icbl.org/wg/nsa/library/iccrblgr.html>, accessed on February 20, 2005

Conventions.

1949

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, United Nations Treaty Series, vol. 75, No.970 ("Geneva Convention I")

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, *ibid* No.971 ("Geneva Convention II")

Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, *ibid*, No.972 ("Geneva Convention III")

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *ibid* No.973 (" Geneva Convention IV").

1969

Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, entered into force 20 June 1974, available at http://www.unhcr.ch/refworld/legal/instrume/asylum/ref_afre.html; accessed on 15 January 2005.

1977

Protocol Additional relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, United Nations Treaty Series, vol. 1125, No. 17513

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entry into force 7 December 1979.

1984

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

U N General Assembly Documents

1970

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Dec. A/5217 (1970), at 121.

1974

Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), 2319th plenary meeting, 14 December 1974.

U N Reports on Rwanda

1993

Final Report of International Commission of Investigation on Human Rights in Rwanda, since October 1, 1990, January 7-21, 1993

Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Wally Ndiaye, on his mission to Rwanda from 8-17 April 1993, U.N. Doc. E/CN.4/1994/7/Add.1 (1993)

1994

Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda, S/1994/470, 20 April 1994

Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of 11 – 12 May 1994, E/C.4/S – 3/3(1994), May 19, 1994

Letter dated 24 May 1994 from the Secretary - General to the President of the Security Council, S/1994/674, May 27, 1994

Report of the Secretary – General on the situation in Rwanda, S/1994/640, May 31, 1994

Report on the Situation of Human rights in Rwanda submitted by Mr. R. Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S –3/1 of 25 May 1994, E/CN.4/1995/7, June 28, 1994

Letter dated 21 July 1994 from the Secretary – general addressed to the President on the Security Council, July 25, 1994

Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, July 25, 1994

Report of the Secretary General on the establishment of the Commission of Experts pursuant to paragraph 1 of Security Council Resolution 935 (1994) of 1 July 1994, July 26, 1994

Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, August 12, 1994

Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, S/1994/1125, October 4, 1994

Report of the Secretary-General on Security in the Rwandese Refugee Camps, S/1994/1308, November 18, 1994

Preliminary Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), (UN Document S/1994/1125)

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1994/1405 (1994), 9 December 1994, Par. 58 and 62

Resolution 955 (1994), adopted by the Security Council at its 3453rd meeting, S/RES/955/1994, November 8, 1994

Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), S/1994/1405, December 9, 1994

1995

Report on the Situation of Human rights in Rwanda submitted by Mr. R. Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution S-3/1 of 25 May 1994, E/CN.4/1995/71, January 17, 1995

Second Report of the Secretary-General on Security in the Rwandese Refugee Camps, S/1995/65, 25 January 1995

Report on the situation of human rights in Rwanda submitted by Mr. René Degni – Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, January 29, 1996

1996

The United Nations and Rwanda, 1993-1996, *the United Nations Blue Books Series*, Volume X, Department of Public Information, United Nations, New York, 1996.C. Reports

Other Reports

1972

International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3 May – 3 June 1972*, Volume II, Second Edition, Geneva, July 1972

1994

The Rwandan Patriotic Front's Offensive, (V), *Defense Intelligence Report*, (J2-210-94), 9 May 1994

Amnesty International: Rwanda, *Mass murder by government supporters and troops in April and May 1994*, May 1994, AI Index: AFR 47/11/94

Final Report of the Commission of experts Established Pursuant to Security Council Resolution 780(1992), S/1994/674 – 27 May 1994, available at <http://www.his.com/~twarrick/commxyul.htm>

Amnesty International, Rwanda: *Reports of killings and abductions by the Rwandese Patriotic Army, April – May 1994*, October 20, 1994, AI Index: AFR 47/16/94

1995

The International Centre for Peace and Conflict resolution Initiative for Africa (ICPCRIA), *La catastrophe Rwandaise: Ses Causes Profondes et les Remèdes pour Eviter sa Ré-edition au Rwanda*, Nairobi, Kenya, 25 March 1995

1996

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996)

1997

Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 covering the period from 1 July 1996 to 30 June 1997, adopted on 6 June 1997, A/52/582, S/1997/868, November 13, 1997.

1998

Humanitarian Law Violations in Kosovo, *Human Rights Watch Report 1998*, available at <http://www.hrw.org/reports98/kosovo/Kos9810-11.htm>, accessed on January 14, 2005.

Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, AI Index: IOR 40/003/1998, April 1, 1998

1999

Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, 15 December 1999, available at http://www.un.org/News/ossg/rwanda_report.htm, Accessed 16 May 2000

2000

International Panel of Eminent Personalities (2000) *Rwanda: The Preventable Genocide* U/IPEP/PANEL, also available on line at <http://www.oau-oua.org/Document/ipep/rwanda-e/EN.html>.

2001

International Crisis Group, *Le Tribunal Pénal International pour le Rwanda: L'Urgence de juger*, Rapport Afrique n°30, Nairobi/Arusha/Bruxelles, 7 juin 2001

2003

Human Rights Watch Briefing Paper on U.S. Military Commissions, June 25, 2003

2004

Human Rights Watch, *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, New York, Washington, London, Brussels and Geneva, 2004, also available at <http://www.hrw.org/>

Cases

ICTR cases.

Trial Chambers' Judgments.

1998

The Prosecutor v. Jean Kambanda, Case No. ICTR – 97 – 23 – T, September 4, 1998.

The Prosecutor v. Jean Paul Akayesu, Case No. ICTR - 96 - 4 – T, October 02, 1998.

1999

The Prosecutor v. Omar Serushago, Case No. ICTR – 98 – 39 – T, February 5, 1999.

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No ICTR - 95 – 1 – T, May 21, 1999.

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No ICTR – 96 – 3 – T, December 06, 1999.

2000

The Prosecutor v. Alfred Musema, Case No ICTR – 96 – 13 – T, January 27, 2000.

The Prosecutor v. George Ruggiu, Case No. ICTR – 97 – 32 – T, June 1, 2000.

2001

The Prosecutor v. Ignace Bagilishema, Case No ICTR – 95 – 1A – T, June 07, 2001.

2003

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, ICTR – 96 – 20 – T & ICTR – 96 – 17 – T, February 19, 2003.

The Prosecutor versus Semanza, Case No ICTR 97 – 20 – T, May 15, 2003.

The Prosecutor v. Laurent Semanza, Separate Opinion of Judge Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, ICTR – 97 – 20 – T, May 15, 2003.

The Prosecutor v. Eliezer Niyitegeka, ICTR – 96 – 14 – T, May 16, 2003

The Prosecutor v. Juvénal Kajelijeli, Case Number ICTR - 98 - 44 A – T, December 1, 2003.

The Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze, Case No ICTR – 99 – 52 – T, December 03, 2003

2004

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-54A-T, January 22, 2004.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-T, February 25, 2004.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Separate and dissenting opinion of Judge Dolenc, Case No. ICTR-99-46-T, February 25, 2004.

Others ICTR decisions (Pre or in trial decisions)

1997

The Prosecutor v. Joseph Kanyabashi, Case NO ICTR – 96 – 15 – T, Decision on defense motion on jurisdiction, Trial Chamber II, June 18, 1997

1999

The Prosecutor v. Hassan Ngeze, Decision on the Prosecutor's Request for Leave to Amend the Indictment, Case No ICTR – 97 – 27 – I, November 5, 1999

2000

The Prosecutor v. Anatole Nsengiyumva, Case NO ICTR – 96 – 12 – I, *Decision on the Defense motion objecting to the jurisdiction of the Trial Chamber on the amended indictment*, Trial Chamber III, April 13, 2000.

The Prosecutor v. Jean Bosco Barayagwiza, Decision on the Prosecutor's Motion for Joinder and Decision on Barayagwiza's Extremely Urgent Motion For Lack of Jurisdiction and for Waiver of Time Limits under Rule 72(A) and (F) of the Rules (par. 2), Case No. ICTR-97-19-I, June 6, 2000.

The prosecutor v. Ferdinand Nahimana, Decision on the Defense Preliminary motion pursuant to rule 72 of the rules of procedure and evidence, ICTR – 96 – 11 – T, July 12, 2000.

Hassan Ngeze and Ferdinand Nahimana c. Le Procureur, Joint Separate opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia, Affaire No ICTR – 96 – 11 – AR72 et Affaire No ICTR – 97 – 27 – AR72, 5 septembre 2000.

The Prosecutor v. Semanza, Case No. 97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, November 3, 2000

2004

The Prosecutor v. Augustin Ndindiliyimana and others, Case NO ICTR – 2000 – 56 – I, March 26, 2004

Appeals Chambers' Judgments.

2000

The Prosecutor v. Omar Serushago, Case No. ICTR – 98 – 39 – A, April 6, 2000.

The Prosecutor v. Jean Kambanda, Case No. ICTR – 97 – 23 – A, October 19, 2000.

2001

The Prosecutor v. Jean – Paul Akayesu, Case No. ICTR - 96 - 4 –A, June 01, 2001.

2002

The Prosecutor v. Ignace Bagilishema, Case No ICTR – 95 – 1A – A, February 25, 2002

2003.

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case no. ICTR-96-3-A, May 26, 2003.

2005

Semanza v. the Prosecutor, ICTR – 97 – 20 – A, May 20, 2005.

Court Records

1997

Rutaganda, (TC), Transcript of court proceedings, October 13, 1997

Rutaganda, (TC), Transcript of court proceedings, November 12, 1997

Akayesu, (TC), Transcript of court proceedings, November 12, 1997

Rutaganda, (TC), Transcript of court proceedings, November 24, 1997

2001

Cyangugu Case, (TC), Transcript of court proceedings, September 21, 2001

2002

Cyangugu Case, (TC), Oral decision, July 4, 2002

Cyangugu Case, (TC), Conclusions Finales de la Défense de Samuel Imanishimwe, June 26, 2003

ICTY cases

Trial Chambers' Judgments and decisions.

1998

The Prosecutor v Anto Furundžija, Case IT-95-17/1-T, December 10, 1998

1999

The Prosecutor v. Zlatko Aleksovski, Case No IT-95-14/1-T, June 25, 1999

The Prosecutor v. Dusko Tadic, Case No IT – 94 – 1- A, July 15, 1999

The Prosecutor v. Blagoje Simic, Miran Simic, Miroslav Tadic, Stevan Torodovic and Simo Zaric, Decision on the pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia – Herzegovina, Case No IT – 95 – 9 – T, March 25, 1999

2000

The Prosecutor v. Tihomir Blaskic, Trial chamber Judgment, IT – 95 – 14 – T, March 3, 2000

The Prosecutor v. Zlatko Aleksovski, Case No IT-95-14/1-A, March 24, 2000

2001

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No.: IT-96-23-T & IT-96-23/1-T, February 22, 2001

The Prosecutor v. Dario Kordic and Mario Cerkez, Case No IT – 95 – 14/2, T, February 26, 2001

Appeals Chambers' Judgments

1999

The Prosecutor v. Dusko Tadic, Case NO IT – 94 – 1 – A, July 15, 1999

2000

The Prosecutor v. Zlatko Aleksovski, Case No IT – 95 – 14 /1 – A, March 24, 2000

2001

The Prosecutor v. Zejnil DELALIC, Zdravko Mucic, Hazim DELIC and Esad LANDZO, AC, (Celebici Case), Case No IT – 96 – 21 – A, February 20, 2001

Other ICTY Appeals Chambers Decisions

The Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT – 94 – 1 – A, October 02, 1995